Supreme Court, U.S.
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No._____

In The
Supreme Court of the United States

October Term, 1995

ALISON E. CLAPP,

Petitioner,

-against-

LeBOEUF, LAMB, LEIBY & MacRAE, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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89 pp

QUESTIONS PRESENTED

I.

Does not LLL&M's *de facto* expulsion of AEC from a national law partnership masquerading as purported "at will" dissolution of the partnership entity accomplish a *Roth*-prohibited deprivation because (i) AEC's interests in the LLL&M partnership are grounded upon State created and defined property interests, *i.e.*, fundamental statutory entitlements legislated into the Partnership Law, and (ii) *ipso facto* LLL&M's "at will" defense is grounded upon an absence of all due process limitation?

II.

Does not the Partnership Law regulate the creation, activities/powers and termination (or "dissolution") of all partnership entities? Thus, may not *only* the State - or a "State Actor" - *enforce* such creation or dissolution?

III.

Has not AEC stated civil rights claims under 42 U.S.C. §1983 challenging the Constitutionality of the Partnership Law because: (i) AEC's property and liberty interests in the LLL&M partnership are Federally protected, and (ii) LLL&M is a "State Actor"?

IV.

Were not the State Court proceedings conducted in violation of AEC's Constitutional rights; is not LLL&M's "at will" defense a sham? Do not Fourteenth Amendment Due Process and Equal Protection guarantees require enforcement of statutory and case law mandated public proceedings establishing "for cause", prior to termination of partnership interests at a national law firm?

PARTIES

The names of all the parties to the proceeding in the Court whose judgment is sought to be reviewed are as follows:

ALISON E. CLAPP,
Petitioner,

v.

LeBOEUF, LAMB, LEIBY & MacRAE; DONALD J. GREENE, DONALD J. GREENE, P.C., TAYLOR R. BRIGGS, TAYLOR R. BRIGGS, P.C., ALAN M. BERMAN, GEOFFRY D.C. BEST, DAVID P. BICKS, DAVID P. BICKS, P.C., CHARLES W. HAVENS, III, CHARLES W. HAVENS, III, P.C., DOUGLAS W. HAWES, DOUGLAS W. HAWES, P.C., CARL D. HOBELMAN, CARL D. HOBELMAN, CHARTERED, RONALD D. JONES, RONALD D. JONES, P.C., GRANT S. LEWIS, GRANT S. LEWIS, P.C., CAMERON F. MacRAE, III, CAMERON F. MacRAE, III, P.C., SAMUEL M. SUGDEN, SAMUEL M. SUGDEN, P.C., Collectively THE LeBOEUF, LAMB, LEIBY & MacRAE "ADMINISTRATIVE COMMITTEE", LeBOEUF, LAMB, LEIBY & MacRAE, IRVING MOSKOVITZ, PETER N. SCHILLER, JOHN A. YOUNG, JOHN C. RICHARDSON, JOHN C. RICHARDSON, P.C., HON. DIANE A. LEBEDEFF, Individually and in her past or present capacity as Justice of the Supreme Court of the State of New York, New York County, and HON. JOSEPH P. SULLIVAN, HON. RICHARD W. WALLACH, HON. THEODORE R. KUPFERMAN, HON. DAVID ROSS, HON. BETTY WEINBERG ELLERIN, HON. FRANCIS T. MURPHY, HON. JOHN CARRO, HON. BENTLY KASSAL, HON. GEORGE BUNDY SMITH, HON. ERNST H. ROSENBERGER, Each individually and in his/her past or present official capacities as Justices of the Appellate Division of the Supreme Court of the State of New York, First Department, (collectively THE "APPELLATE DIVISION," FIRST DEPARTMENT),

Respondents.[1]

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[1]This Petition is related to that dispute identified as *Alison E. Clapp v. Donald J. Greene, LeBoeuf, Lamb, Leiby & MacRae, et al.*, Petition for Certiorari No. 91-249 (denied October 7, 1991) and Petition for Certiorari No. 94-986 and Motion to Defer Consideration dated November 28, 1994, in *Alison E. Clapp v. LeBoeuf, Lamb, Leiby & MacRae, et al.* (both denied January 17, 1995).

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ALISON E. CLAPP,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS AND ORDERS BELOW

The opinion of the District Court officially is not reported and appears in appendix ("**App**") A at 1a, (the "**Second Federal Opinion**"). The United States Court of Appeals for the Second Circuit affirmed by Summary Order which officially is not reported and appears in App B at 21a (the "**Second Summary Order**"). The order of the United States Court of Appeals for the Second Circuit denying the petition for rehearing *en banc* appears in App C at 25a. The judgment of the District Court dismissing the action appears in App D at 27a.

JURISDICTION

The judgment of the United States District Court for the Southern District of New York was entered on August 30, 1994, 1994. An appeal to the United States Court of Appeals for the Second Circuit was denied by Summary Order dated April 11,

1995 (the "**Second Summary Order**"). A timely petition for rehearing *en banc* was filed on April 24, 1995, and thereafter was denied on June 22, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

As outlined in the Appendices, the following provisions are involved: U.S. Constitution, Fourteenth Amendment; 28 U.S.C. §§1331 and 1343; 42 U.S.C. §1983; McKinney's Consolidated Laws of New York, §§61, 62, 63, 68, 69, 80-81 (the "***Partnership Law***").

STATEMENT OF THE CASE

A. Jurisdiction of the District Court

Subject matter jurisdiction in the United States District Court was grounded upon Federal Question jurisdiction, i.e., upon the Fourteenth Amendment to the Constitution of the United States, and 42 U.S.C. §1983 (the "**Civil Rights Statute**"), which provisions authorize suit in the District Court pursuant to 28 U.S.C. §§1331 and 1343.

B. Nature of Case, Course of Proceedings, Disposition Below

This action presents claims against LeBoeuf, Lamb, Leiby & MacRae, ("**LLL&M**"), an Acting Justice of the Supreme Court (New York), Hon. Diane A. Lebedeff ("**Lebedeff, J.**") and Justices of the Appellate Division (collectively, the "**Judicial Appellees**"), alleging deprivations of constitutional rights secured to Alison E. Clapp ("**AEC**"), as well, a claim alleging unconstitutionality of statutes of the State of New York (the "**Statutes**"). Additionally, AEC contends that a grant of summary judgment to LLL&M upon fourteen (14) meritorious claims alleged in a State court action upon a complete discovery stay precluded any ability for revelation of an LLL&M sham "at will" dissolution defense, as well, unconstitutionally precluded all relief to AEC.

In March, 1990, AEC commenced an action against LLL&M grounded upon Title 29 U.S.C. §1132, et seq. ("ERISA") and amended claims grounded upon Title 18 U.S.C. §1961 ("RICO"), in the United States District Court (SDNY), entitled *Clapp v. Greene, et al.*, 90 Civ. 1690 (RPP), (the "**First Federal Action**"). Thirty-seven (37) days later the court granted a discovery stay. In August, 1990, the court dismissed the Federal claims pursuant to R. 12(b)(6) upon the pleadings - notwithstanding LLL&M conceded and Federal procedural rule mandated R. 56 conversion to summary judgment. Thereupon, the court declined to exercise pendent jurisdiction over related State claims, particularly partnership claims.[2]

Seven (7) months later, - two (2) weeks subsequent to AEC's reply brief submission - oral argument of AEC's appeal was heard by the Second Circuit.[3] Two (2) weeks later, by summary order

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[2]The First Federal Action is reported at *Clapp v. Greene, 743 F.Supp. 273 (SDNY 1990) ("**First Federal Opinion**"), aff'd* 930 F.2d 912 (2nd Cir. 1991) (the "**First Summary Order**"), *cert. denied* __ U.S. __, 116 L.Ed.2d 157 (1991) . AEC sought relief in the Second Circuit, in particular upon the district court's allowance for LLL&M summary judgment motions ("*Sum J Motion*") upon a sham defense against every claim, together with the discovery stay, the failure to docket applications for preliminary injunction, the adoption of *Trial By Affidavit* contention and impermissible inference in a **Background** which erroneously - and prejudicially - omitted all ERISA-claim-supporting medical facts, together with the grant of a represented dismissal on the pleadings without leave to amend, notwithstanding mandatory conversion to summary judgment apparent upon the face of the First Federal Opinion. The allowance of LLL&M's Sum J Motion under R. 56 *compelled* production from AEC of *all* evidence in support of *all* claims, including all pendent claims; meanwhile, LLL&M was authorized to proceed against all AEC claims upon *memorandum contention* for "at will" dissolution and upon sparse and conclusory affidavits to the same effect by LLL&M's present and former Chairs. The "form" of dismissal, i.e., represented R. 12(b)(6) dismissal, as well, thereby avoided mandatory findings/conclusions (R. 52(a)), notwithstanding actual conversion to R. 56 standard.

[3]Prior to the March 15, 1991, calendar call of AEC's appeal to the Circuit, Hon. Jon O. Newman, U.S.C.J., presiding judge, directed that counsel for the parties confer privately relating to any challenge to Judge Newman's participation in the hearing of the appeal grounded upon announcement at the calendar call that LLL&M had been retained by Judge Newman and had drafted Judge Newman's will. A challenge was not presented, notwithstanding that LLL&M declined to

(the "**First Summary Order**") the Second Circuit affirmed, notwithstanding plain error - mandated R. 12(b)(6) conversion to R. 56 standard. The First Summary Order misdescribed the record, including misdescription of the oral argument upon the appeal, viz., concerning ERISA-claim-supporting facts, nonetheless the First Summary Order characterized as "*on appeal ... circumstances", rather than actual AEC affidavit facts* "presented to and not excluded" (R. 12(b)(6)), which had assured ERISA jurisdiction - and reversal. The misdescription centers upon the circumvention, nonetheless, unfair "**Beg the Question**" characterizations concerning the **central issue** in this dispute, one which remains - the absence of all evidence supporting any LLL&M dissolution "at will" or otherwise; more, the compelling existence of **all** evidence solely to the contrary, i.e., the convincing evidence of sham defense, nonetheless, one repeatedly characterized prejudicially as though "actual". Subsequently, **this prejudice** was transferred into the State Court Action at every level - indeed, into the Second Federal Action - thereby, **precluding to AEC any fair proceeding in any forum**.[4]

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state for the record the length of time that LLL&M had such relationship with Judge Newman.

[4]AEC sought review upon a Petition For Certiorari, No. 91-249 (the "**First Petition**"). AEC identified as clearly erroneous/unfair the denial of a Federal forum grounded upon valid claims. Additionally, AEC asserted that the Circuit had failed to require recusal in consequence of the *prior district court's conduct*, e.g.,

> A. characterization of AEC's pleadings as a "**hold-up**" thirteen (13) days after commencement in the presence of LLL&M's counsel, immediately prior to the submission of LLL&M's Sum J Motion against all fifteen (15) claims virtually exclusively upon a purported "at will" dissolution of the LLL&M entity upon the affidavit contention of Donald J. Greene, LLL&M's Chair ("Greene");
>
> B. statements in June, 1990 - *i.e., subsequent to AEC's application for preliminary injunction which required R. 52(a) findings/conclusions* - representing understanding "of '**Big Firm' problems**" and urging AEC's abandonment of the legal system, adding that the ERISA litigation, one grounded upon medical distress, could be "long, arduous and ***bad for a party's health***," that the "press would have a field-day with this scandal", and

for the ***first time***, urging that AEC retain other "*independent counsel...*";

C. statements in June, 1990, - notably, subsequent to acknowledgment of absence of any LLL&M "notice of dissolution", and absence of expulsion power in the agreement - that upon LLL&M's Sum J Motion, one which presented a single legal issue, the "at will" defense (characterized by the district court as leaving "**everything up for grabs**") that: "I understand what they have done. They have **continued the Partnership** under the same name with different partners...";

D. ***declining*** in August, 1990, ***to docket*** AEC's June, 1990, ***preliminary injunction application*** upon grounds of failure in compliance with a local rule requiring contention of urgency, notwithstanding repeated affidavits of urgency and continuing *court-acknowledged*, uncontested, irreparable injury;

E. issuance of the First Federal Opinion representing grant of summary judgment to LLL&M "upon the pleadings" without leave to amend, notwithstanding published, *express reliance* upon prejudicial *Trial By Affidavit* LLL&M affidavits, as well, AEC *affidavits - notably, however, prejudicially omitting all ERISA-claim-supporting medical facts contained in AEC's affidavits - nonetheless, upon the reliance thereby* ***mandatorily converting*** the motion to R. 56 standard, and as well, issuance of the First Federal Opinion notwithstanding *prior filing of mandamus application* together with request for voluntary recusal; and

F. the addressing of AEC's recusal/preliminary injunction application in October, 1990: "I can't grant a preliminary injunction on these papers.... It requires a hearing .... *You have maybe an equity right that this is a* ***sham dissolution***. ***You maybe quite right...***", adding - but *not* to the Federal Supplement published opinion - that the published characterization of AEC as a "former" and "terminated" partner were *not findings*, but rather the "factual situation"; that *AEC's status "could be litigated to a fare-thee-well"*;

Under recusal precedent, e.g., most recently, *Liteky v. United States*, __ U.S. __, 114 S.Ct. 1147 (1994), recusal appeared appropriate. However, the Circuit addressed R. 12(b)(6) characterization, rather than "conversion" to R. 56 standard, as well as omitted reference to *Cheng v. GAF Corp.*, 713 F.2d 886, 891-92 (2nd Cir. 1983), i.e., precedent available to correct the prior district court's inappropriate interference with AEC's marital and attorney/client relationships, see e.g., *Board of Regents v. Roth*, 408 U.S. 564, at 571-72 (1972) ("[L]iberty...guaranteed... to engage in... common occupations of life, ...to marry, establish a home and bring up children...."; nonetheless, the Circuit continued to approve the appropriateness of AEC's mandamus procedure, see

In consequence of this unfair denial to AEC of Federal forum, in July, 1991, AEC commenced an action in the Supreme Court of the State of New York (the "**State Court Action**") including request for declaratory relief addressing the status of the partnership, AEC's continuing interests and any §§'s 80-81 authorization for continuing use of the partnership **name**. In August, 1991, - as in the First Federal Action upon immediate and comprehensive LLL&M summary judgment practice and an *immediate discovery stay* - again, solely upon the same sparse and conclusory affidavit contentions, LLL&M presented the identical defense, viz., a purported **"at will" dissolution** ***as of*** December 31, 1989, with contended "reconstitution" ***as of*** January 1, 1990; however, absent AEC.

LLL&M submitted this defense notwithstanding conceded absence of §62(d) expulsion power in LLL&M's agreement, conceded failure in application of §63 dissolution proceedings, and the absence of all evidence for compliance with **§§'s 80-81**, the statutory authorization i.e., **license**, for continuing use of name *solely* upon certificate filing and publication.[5] Thereafter, for the *first time* in this dispute, in September, 1991, solely by contention of former Chair, Taylor R. Briggs ("Briggs"), LLL&M contended that such "at will" dissolutions occurred as **annual "policy" since at least 1981**. These contentions were supported solely by the sparse and conclusory affidavits of Greene and Briggs; *not* a piece of paper otherwise has been produced concerning this purported defense - nor so required by any judicial officer in any forum.[6]

Schoenberg v. Shapolsky, 971 F.2d 926 at 929-35 (2nd Cir. 1992). *Cf.* AEC's *order to show cause* application for preliminary injunction *pending for 2½ months; then, not docketed.*

[5]In July, 1990, (i.e., in the *First* Federal Action), AEC presented evidence of LLL&M's submission of sham defense, viz., LLL&M's **singular June, 1977**, determinative filing in the New York County Clerk's office of a §§80-81 mandated **"Certificate of Continued Use of Partnership Name of LeBoeuf, Lamb, Leiby & MacRae ...."**.

[6]LLL&M produced the 1986 Agreement which included AEC as a "Schedule 'A'" partner. Subsequent to commencement of the First Federal Action, without authority, **LLL&M deleted AEC's name from "Schedule 'A'"**. LLL&M submitted the 1990 agreement to support the "at will" defense and has never

In February, 1992, Lebedeff, J. granted *summary judgment* to LLL&M *upon the pleadings*, i.e. upon all claims, notably, again, upon "Beg the Question" avoidance of the central issue, the absence of determination by finding or judgment of the purported "at will" defense, nonetheless, unfairly characterized as though "actual" (the "**Lebedeff Ruling**"):

> "The thrust ... is that ... defendants could not lawfully dissolve the partnership which included plaintiff...in order to expel plaintiff without cause. [C]auses of action: ... and (7) injunctive relief prohibiting the termination of the partnership.
>
> .... [A] partnership at will terminable at any time by the act of any partner ... ...[A]n aggrieved partner has a remedy in damages but cannot compel the continuation of the partnership.... Plaintiff is **unable** to point to any clause *in the ... agreement* that would render **these concepts inapplicable**.... [citing Agreement, §1(a)]. Because the partnership explicitly had an indefinite term, such dissolution is permitted under Section 62... Further, [§62(d)] ... explicitly permits expulsion if in accord with the partnership agreement. Based upon these principles, plaintiff's various claims to enforce the partnership agreement must fall....[7]

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identified - nor so has been required to identify - purportedly who invoked the contended "at will" dissolution(s), i.e., purportedly, "who, if anyone, ***withdrew***?" The Circuit Panel's retrospective effort to posit credibility to the Summary Order, i.e., "[n]ewly formed...excluded... twenty-eight other attorneys", continues unfairly the Beg the Question approach: such other "attorneys" (presumably, "partners") so were "excluded" upon conceded, *express consent*, *see* Agreement ¶8(c)("*Notice of Withdrawal*...90 days..."); notably, an event precluded to cause "dissolution".

[7]The Lebedeff Ruling does *not* "find" or "adjudge" a "dissolution 'at will'" or otherwise, ***nor mention §§ 80-81***, rather, identifies "principles" upon which there was ***not*** presented any dispute, then, records that - as undisputed - AEC did *not* contest such principles: the issue in dispute, circumvented! AEC did *not* contend that "at will" dissolution is not a "right", rather not an unlimited "right"; nor did AEC contend that LLL&M could not "dissolve". Rather, consistently AEC has contended:

The Appellate Division affirmed and the New York Court of Appeals dismissed AEC's several appeals. *Clapp v. LeBoeuf, Lamb, Leiby & MacRae, et al.*, 188 AD 2d 386, 592 NYS 2d 580 (AD 1, 1992), *appeal denied*, 81 NY 2d 1006, 599 NYS 2d 805 (Ct. App., 1993). AEC's Petition for Certiorari, No. 94-986, to this Court was denied by order dated January 17, 1995. *Clapp v. LeBoeuf, Lamb, Leiby & MacRae, et al.*, __ U.S. __, 115 S.Ct. 924 (1995). Throughout these proceedings - also, into the Second Federal Action, *see, infra* - LLL&M submitted opposition primarily grounded upon the "at will" defense and used in support **verbatim** the Circuit Court's 1990 unfair First Summary Order affirmance.

In November, 1993, in the U.S. District Court (SDNY), 93 Civ. 8084 (SS), (the "**Second Federal Action**"), AEC sought preliminary injunctive and the other relief, presenting a **general constitutional challenge** to the Statutes. The application was denied, again, absent R. 52(a) findings/ conclusions. This error is not corrected in an August, 1994, Second Federal Opinion which continues the "Beg the Question" circumvention of central

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(i) "at will" dissolution is not a legal alternative to the conceded absence of express expulsion power;

(ii) the "at will" right is **precluded by LLL&M's Agreement** i.e., a right authorized by § 62(2), however, because "in contravention", a "right" with adverse consequence upon any partner who implements any actual dissolution, "at will" or otherwise;

(iii) *any LLL&M dissolution*, at will or otherwise, annually "since 1981 or earlier", *has not occurred*, but rather has remained a sham and a contrivance documented by §§80-81 non-compliance; and that

(iv) in consequence, the LLL&M partnership to which AEC since 1986 has remained a "Schedule A" identified member *continued* with AEC as a continuing partner, *or*, that de facto AEC has been expelled illegally, i.e., absent all §62(1)(d) authority.

AEC has contended that she remains an LLL&M partner *because* LLL&M's "at will" defense is both prohibited by law and a sham. AEC has *not* withdrawn, and LLL&M admits that the Agreement does not contain any express expulsion power, indeed, repeatedly, LLL&M late **concedes that AEC has *not* been expelled!**". (R LLL&M Mem., N.Y. Appellate Div., p. 15).

issue.[8]

REASONS FOR GRANTING THE WRIT

A. AEC's §1983 Rights; Respondents Are "State Actors"

In *Roth*, 408 U.S., supra, at 569-70, the Court stated:

> The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount....[9]

An "at will" principle so authorized by the State judiciary which accomplishes a "de facto" expulsion, i.e., *not* a "withdrawal" by a partner voluntarily choosing to dissociate, accomplishes ***Roth***-prohibited deprivation - self-evidently "at will" - nonetheless, absent all §§'s 62(d) and 63 due process limitation. AEC's interests in the partnership are grounded upon **the Partnership Law**, i.e., fundamental statutory entitlements regulating an historical form of enterprise, including statutorily determined creation (or formation), activities/powers, and

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[8]Seven (7) days prior to the district court dismissal, the court denied AEC's request for an evidentiary hearing relating to the court's denial of open-court statement that the court has/had a relationship with Lebedeff, J. AEC's motion to the Circuit Court for adjournment and reassignment was denied by order dated April 10, 1995. See App E at 29a. Also, AEC's motion for postponement of *en banc* proceedings pending United States Supreme Court review of an April 1, 1995, *N.Y. Times* report of a "mentor" relationship between the district court judge and Cabranes, USCJ, was denied by order dated May 12, 1995. *See* App F at 43a.

[9]Unlike *Roth* - no "suggestion" State had "imposed... *stigma*..." that affected livelihood, 408 U.S. at 573 - here, there was certainty to stigma and adverse effect upon livelihood. Also, unlike *Roth* - no regulation barred livelihood in a profession - here, there is certainty of State regulation, indeed, regulating "dissolution(s)"!

termination (or "dissolution").[10] ***Only the State*** **- or a "state actor"** - may grant or deprive certain "statutorily determined" rights; *only* the State - or a "State Actor" - **may *enforce* creation and dissolution.**[11]

AEC's State "created and...defined" property interests may be precluded *only* upon the means legislated into the Partnership Law - means which assure minimal due process (and equal protection), viz., §§'s 62(d), 63 and 80-81 - not the usurpation "at will", here, contended. Can it be doubted that the "at will" contention advanced, indeed, in complete silence and invincibly replaces these principles, that 132 LLL&M "partners" succeeded to AEC's property interests absent *all* limitation of §62(d) express expulsion power, absent §63 dissolution proceedings for cause against a partner, more, absent all compliance by LLL&M ("since 1981 and earlier") with §§'s 80-81 - i.e., statutes tacitly overlooked (unenforced) and made nugatory by the State authorities solely empowered to supervise, administer and enforce

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[10]AEC satisfied all entitlement to property interest, *Mehta v. Surles*, 905 F.2d 595 (2nd Cir. 1990). AEC maintained more than a "unilateral expectation" of benefit, indeed, concerning an Agreement which precludes "at will" dissolution and does not include §62(d) expulsion power and concerning which contended "dissolution" there has not been accomplished any §63 proceedings - rather, avoidance of summary judgment (and/or preliminary injunctive) relief upon grounds of "wrongful expulsion" and/ or continuing, i.e., *not* dissolved entity. *See, Martz v. Inc. Village of Valley Stream*, 22 F.3rd 26 at 30 (2nd Cir. 1994) (*absence* of *statutorily imposed* entitlements "clearly recognized in State law" results in absence of Federally protected property rights; *cf.* AEC's "statutorily imposed" entitlements *legislated* into §§62(1)(d), 63 and 80-81.

[11]The Agreement which purportedly authorizes "re-constitutions"/ "re-formulations" "at will" - i.e., absent all "statutorily imposed" §62(1)(d), 63 and 80-81 reference (or *enforcement*) - is *not* an "ordinary contract" (*Martz*, at 30-31), but rather, as purportedly implemented and contended so to be interpreted, an "instrument of government", albeit, wielded unconstitutionally in private hands. *See S&D Maintenance Co. v. Goldin*, 844 F.2d 962, 966-67 (2nd Cir. 1988) (breach of "protectible" interest - e.g., §§62(1)(d), 63, 80-81 "statutorily imposed" obligations, more, in context of "[a] State's revocation of a status" - establishes §1983 claim); and *Schaper v. City of Huntsville*, 813 F.2d 709, 717 n.8 (5th Cir. 1987) (*substantive violation* upon "deprivation of a property interest for an improper motive and by means that [are] pretextual, arbitrary and capricious").

precisely such statutes and upon such authorities' certainty of knowledge of *years* of failure in compliance and enforcement, viz., a "failure to regulate".[12] LLL&M's contention that all (132) partners of the 1986 entity - excepting AEC - could (or did) withdraw "at will" so to "re-form"/"re-constitute" rewards unconstitutionally "form" over substance[13], makes nugatory requirement for §62(d) express expulsion power and §63 due process dissolution proceedings, deprives such excluded partner of all interests "created... and defined" by the Statutes, more, absent the guarantees which that partner had been assured the Fourteenth Amendment made certain the State could not do. In *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 111 S.Ct. 2077, 2082-83 (1991), the Court identified a two-step inquiry:

> "[w]hether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority and ... whether the private party charged with the deprivation could be described in all fairness as a state actor."

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[12]*See Cobb v. Georgia Power Co.*, 757 F.2d 1248 (11th Cir. 1985). *See also Barreti v. United States*, 798 F.2d 565, 575 (2d Cir. 1986) ("unconstitutional deprivation ... occurs when government officials thwart vindication of a claim by violating ... principles that enable ... claimants to assert their rights effectively"); *Halloway v. Walker*, 784 F.2d 1287, -92 (5th Cir. 1986) ("post-deprivation remedy" through appeal, inadequate); *Johnson v. American Credit Co.*, 581 F.2d 526, 533-34 (5th Cir. 1978) (statute held invalid because *no discretion* by court not to issue writ of attachment, i.e., an "at will" world).

[13]These terms are *not* found in the Partnership Law, nor in any precedent concerning *any* partnership event, nor in *any* findings/ conclusions, or judgment, declaratory or otherwise, excepting concerning characterizations of this dispute. A State court has addressed such dissolution *un*reality - and consequence of continuing partnership interests, indeed, since March, 1990:

> "[T]he venture has functioned in the same manner from its inception, the *appellants never notified anyone they considered the venture dissolved*, the plaintiff's own actions indicate no intent to terminate the venture and there has never been a distribution of assets or winding up of affairs. ...[T]he...declaration that *...plaintiff retains a 10% interest...was correct.*" *Framson Inc. v. Queens Inner Unity Cable*, 562 NYS 2d 545, 546-47 (AD 2 Dept 1990). (Emphasis added).

LLL&M contends that "at will" dissolution is an invincible "right" created by the State; the Lebedeff Ruling places the color-of-law upon exercise of such right, nonetheless, *unconstitutionally absent* any:

(i) recognition of effect upon constitutional guarantees grounded upon conceded absence of §62(1)(d) power, indeed, absent observation that such "right" expressly is precluded;

(ii) reliance upon/reference to §63 proceedings, nor §§80-81 requirements, notwithstanding an "at will" taking; i.e., notwithstanding concurrent injury to property, reputation *and* professional occupation;

(iii) public hearing or other fair proceeding at which the "at will" contention could have been tested; nor

(iv) *discovery* upon the reality of any "at will" dissolution, including possibility for revelation of LLL&M's failure in compliance with §§'s 80-81.[14]

In a partnership dissolution context, this Court in *Wyatt v. Cole*, 504 U.S.__ , 112 S.Ct. 1827 (1992), reviewed these facts:

> This dispute arises out a soured cattle partnership... [R]espondent...Cole *sought to dissolve his partnership* with petitioner...Wyatt. *When no agreement could be reached,*

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[14]***A §1983 conspiracy*** necessitates proof of "an actual deprivation of a constitutional right." *Dean Tarry Corp v. Friedlander*, 826 F.2d 210, 213 (2nd Cir. 1987). AEC has sustained deprivation "at will" of property rights, together with preclusion of disclosure and evidentiary hearing upon an express or implied agreement among these Respondents. See, *Tower v. Glover*, 467 U.S. 914 (1984) and *Dennis v. Sparks*, 449 U.S. 24 (1980) (§1983 remedy grounded upon conspiracy between otherwise private parties and state judiciary); and uncontested §§80-81 non-compliance. Notably, there has *not been held by any court* in this dispute at any time that there has been *any dissolution* of LLL&M at any time, as policy or otherwise. *Rather*, there has been held that AEC's *status* as affected by LLL&M was "*without cause*". (Lebedeff Ruling).

Cole...filed a state court complaint in *replevin* against Wyatt,...

Obviously, Cole and this Court remain unaware that according to Respondents an invincible remedy has been available - as an alternative - which would have compelled avoidance in announcement of all Supreme Court precedent limiting pre-judgment remedies, e.g. *Fuentes v. Shevin*, 407 U.S. 67 (1972); indeed, according to Respondents, the "at will" principle should have precluded *Wyatt*. It is Respondents' position that the "at will" defense - a State-created "right or privilege" - because contended invincible, replaces all need or requirement for any State pre-judgment statute, indeed, replaces all need for judicial activity! Likewise, the "at will" principle makes nugatory §63 - a now superfluous procedure for extinguishment of partnership interests - "for cause", indeed, the principle authorizes the omission of all §§'s 80-81 filing and publication requirement, i.e., the omission of all *public* record of "at will" extinguishment, notwithstanding real consequence and stigma, now, in consequence of the Lebedeff Ruling, *statutorily compelled* to be *un*disclosed! Respondents' contention for an invincible "at will" principle has returned us to a pre-*Fuentes* world.

In adoption of such anarchical contention, LLL&M has acted as a "state actor", more, LLL&M has acted as a separate state government! Retrospectively, in justification and defense to the extinguishment of AEC's partnership interests and injury to her reputation and livelihood - "at will" - LLL&M "obtained significant aid from state officials".[15] Precedent circumscribing pre-judgment remedies and the heretofore settled due process preserving Statutes, now, in consequence of the Lebedeff Ruling, have been held not to apply; the "at will" principle, to the

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[15]Absence of requirement for any (e.g., §63) "for cause" hearing is a decisive factor. *See Connecticut v. Doehr*, 501 U.S. 1 (1991). As in *Shelley v. Kraemer*, 334 U.S. 1 (1948), the Fourteenth Amendment applies because the restrictive purposes contended to be the "agreement" have been secured solely through State judicial enforcement; as in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985), [LLL&M's] conduct was ascribed to governmental decision and was authorized by State officials, i.e., the "weight of the State" was placed behind a private decision to invoke a statute. In the words of LLL&M's counsel, "They could tell her to leave if she wore the wrong color dress." [R 352].

exclusion of all other law, has given a "legal", complete and silent extinguishment of any partnership interest, at any time, for any or no reason. In so acting, LLL&M performed a "traditional governmental function", i.e., the unrestrained pre-judgment seizure of AEC's property - albeit unconstitutionally. More, LLL&M, did so in reliance upon Statutes contended as legitimate and so accepted by the Judicial Respondents, thus, providing "government assistance and benefits... [with] injury aggravated in a unique way by the incidence of government authority". *See Edmonson*, 111 S.Ct., *supra*, at 2082-83. Unquestionably, all of LLL&M's purported rights had their "source in State law": *enforcement* of Statutes - or lack of enforcement - which heretofore had provided for rational partnership termination (or "dissolution") remedies, §63, had provided for indicia of compliance concerning joint-partner accountability, §§'s 80-81 - is a "uniquely and constitutionally compelled government function". *Id.* LLL&M acceded to this "government" role - indeed, "at will".[16] LLL&M is a "State Actor":

(i) it is the traditional function of government to monitor/control partnership activities, e.g., formation, expulsion, dissolution, winding-up, and *continuing use* of name; LLL&M purports an invincible "at will" usurpation of these functions;

(ii) LLL&M contends reliance upon State procedures "at will", invincibly, pre-judgment to seize AEC's property interests; as well, "at will" without power or cause, ignominiously to injure AEC's reputation and professional occupation;

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[16]Essential government functions include legislation, and enforcement of statutes, e.g., *public* modes of partnership dissolution, winding-up and/or continuation under same name and evidence of effect upon third-parties. It is for government to **enforce** these functions in a fair manner - not in a manner absurd or nugatory. Acceptance of any legitimacy to the "at will" principle as contended necessarily results in an impermissible delegation of government function to a partnership, i.e., delegation of State supervision of elemental, public, partnership activity to an otherwise "private" actor, LLL&M.

(iii) State statutes (§§ 62,63-69, and 80-81) have been violated in unique ways; there is absent any other documented purported use of "at will" dissolution in lieu of actual authority in an agreement or upon §63 proceedings to accomplish such *de facto* expulsion - more, from a national law partnership; and

(iv) the record is devoid of all evidence of any dissolution at any time or under any circumstance - rather, conclusive of sham "dissolution;" nonetheless, summary judgment repeatedly has been applied at the pleadings stage to all claims notwithstanding meritorious, and all upon complete and immediate discovery stay(s).[17]

Indefensibly, the Lebedeff Ruling involves State authority in justification of a "private breach of the peace", *see Flagg Bros. Inc., v. Brooks*, 436 U.S. 149, 160 n.9 (1978). As in *Shelley*, 334 U.S., supra, the Lebedeff Ruling commands LLL&M to do that which the State may not do, i.e., "at will" - with assurance of silent approval, seize AEC's property and destroy her reputation

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[17]*See National Collegiate Athletic Asso. v. Tarkanian*, 488 U.S. 179, 109 S.Ct. 454 (1988): here, the State has provided a *mantle of authority* to LLL&M enhancing LLL&M's power to cause harm, *inter alia*, because: (i) LLL&M could not exercise "at will" dissolution de facto to expel absent the overt significant assistance of the State courts, indeed, a State created legal framework governing LLL&M's conduct upon which LLL&M relied and acted, viz., § 62(1)(b) "at will" dissolution, more, (ii) LLL&M received all assistance and benefit from the State's non-enforcement of §§ 62(1)(d), 63 and 80-81, indeed, allowance for continued, nonetheless, *prohibited* use of partnership name, notwithstanding court-filed and judicial monitored written evidence of sham defense, (iii) these judicial authorities - according to LLL&M's "at will" contentions - must enforce such de facto expulsion; (iv) thus, the State has delegated to LLL&M - "at will" - the State's authority purportedly to "re-constitute" or "reformulate" absent evidence for an "actual" event; and (v) AEC's injury was aggravated in a unique way by absence of public "for cause" justification for such interference. *See also, Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1265-67 (3rd Cir. 1994) (private conduct attributable grounded upon "compulsion" for enforcement, i.e., an "at will" requirement); *cf. Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 95 S.Ct. 449 (1974), (no state action because State did not put its own weight on the side of the proposed practice by ordering it).

and occupation.[18]

B: The State Court Unconstitutional Proceedings: LLL&M's Agreement Precludes "At Will" Dissolution

Dissolution "at will" is precluded in the Agreement, except in contravention - a circumstance authorized by §62(2) so that partners may not be "held captive", notwithstanding consequence of an "at will" *withdrawal*. The Agreement establishes: (i) a "partnership" or "**the firm**"; (ii) for a **term** which shall be indefinite; (iii) **the firm** shall continue until the completion of any winding up; and (iv) **notwithstanding**,

> a) death, b) retirement, c) withdrawal, d) admission, or e) **any** other act or condition **not in contravention**...that by operation of law might constitute a dissolution ...[e.g. a represented "**at will dissolution**" contended by Greene and Briggs to have occurred], *the firm* [i.e. that entity (or aggregate)],

(v) ***shall continue***... by ***consensual arrangements***, and [***only***] (vi) for the purpose of ***the firm*** so continuing by "consensual arrangement" - notwithstanding "death, retirement, admission, [or] withdrawal" - but ***not*** expressly prohibited "at will" dissolution - a waiver "effectuating the foregoing" stated intent, may become effective; and (vii) ***"Schedule A" listed members*** of ***"the firm"***, e.g., *AEC*, "shall be those individuals...so named... whose membership ***shall not have ceased...by death, retirement or withdrawal***...".

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[18]See *Robert W. Stark Jr., Inc. v. New York Stock Exchange Inc.*, 346 F.Supp. 217, 232 (SDNY 1972), *aff'd* 466 F.2d 743 (2nd Cir. 1972) ("Such a severe penalty has not before been visited..." absent express expulsion power contained in an agreement.) AEC's pecuniary damages are far from speculative. See *H.L. Hayden Co of N.Y. v. Siemens Medical Systems*, 879 F.2d 1005, 1024 (2nd Cir. 1989) and *Paul v. Davis*, 424 U.S. 693 (1976) (LLL&M's "at will" conduct adversely has affected not only AEC's ***reputation***, but also, concurrently, her partnership interests, professional occupation and professional standing - indeed, unconscionably). See also, *Martz*, 22 F.3d, supra, at 31-32 ("*stigma plus*": LLL&M's conduct concurrently altering AEC's "legal right[s] and status", - more, upon obvious sham defense).

Predictably, the Agreement contemplates a consensual change in "membership" to accomplish a change in partnership status, not a "dissolution" - at will or otherwise.[19] Did 132 LLL&M partners or even one "at will" dissolve and a "new" partnership formed which **is identical to the entity existing 1986-1989, absent consensual changes, excepting for AEC?** Repeatedly, LLL&M has repudiated all interest in submission of evidence concerning under what format/terms and conditions the purported transfer(s) between the Firm(s) and the "new" entity(s) has taken place.[20] LLL&M has distorted the "at will" principle, one interpreted universally for legitimate "withdrawal" by a partner - not purported withdrawal by all excepting one - so as to escape

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[19]LLL&M included an express barrier to an individual partner or more likely group of partners who might otherwise attempt to impose the significant disruption of an actual "at will" dissolution upon *the Firm*. Theoretically, a §62(2) "at will" dissolution would remain available, however, since expressly stated to be "in contravention", such dissolution would be in bad faith, thus, in breach of fiduciary duty, i.e., a §62(2) dissolution "in breach" with §69(2) consequence.

[20]LLL&M has rejected all opportunity to identify arrangements made by "continuation/liquidation agreement(s)", or otherwise, to accomplish resolution of *actual* dissolution concerns, e.g., upon the purported dissolutions since "1981 and earlier", where are the sets of books so recording these events, and what have been arrangements for:

i. manner of transfer(s) of assets and liabilities;
ii. effect(s) upon executory agreements, leases, contracts, loans, particularly bank loans (e.g., "default" provisions);
iii. effect(s) upon financial statements, accounts receivable/ payable, negotiable instruments;
iv. effect(s) upon insurances, particularly malpractice coverage;
v. effect(s) upon work in progress, particularly litigation;
vi. notices to/acknowledgments by creditors; tax effects;
vii. satisfaction(s) of governmental mandates, e.g., ***Supreme Court, New York, Appellate Division*** "DR9-102": ***D-Required Bookkeeping Records***; ***G-"Dissolution of a Firm"***; and employer liabilities to employees;
viii. novations, discharges, or indemnity agreements; and
ix. notice(s) to third parties, including former clients of the firm(s) and post-dissolution(s) consequences, e.g., "new" partner(s) status concerning pre-dissolution(s) events.

significant public accountability for an illegal de facto expulsion. "At will" dissolution is in contravention of the Agreement: §8(c) solely authorizes change in membership upon **consensual** "withdrawal" - expressly without "dissolution". LLL&M's legal inability to expel - because absent power or authority in the Agreement - has not been questioned:

> ***Partners have no common law or statutory right to expel ... another partner from a partnership***. They may, ... provide in their agreement for expulsion under ***prescribed conditions which must be strictly applied***. *Millet v. Slocum*, 167 NYS 2d 136 (AD 4, 1957).

State legislatures have enacted "due process" §62(1)(d) express expulsion provisions and §63 "for cause" provisions.[21] *See R.R. Village Ass'n., Inc. v. Denver Sewer Corp.*, 826 F.2d 1197, 1201, (2nd Cir. 1987):

> Property interests are created, and their dimensions defined, by state law. [citing *Loudermill*].... Whether a state-created interest amounts to a property right of which the holder may not be deprived without procedural due process is a question of federal constitutional law. ....[citation omitted]. *A state-created entitlement that cannot properly be eliminated except for cause is a property right* of which the holder may not be deprived without procedural due process....

There does not appear to be any explanation for this denial of all relief to AEC other than that such has occurred as a practice and policy applied with deliberate indifference so as to preserve/protect the reputation and property interests of a culpable, national law partnership at the expense of a 38-42 year old, two (2) year partner in a minor department who relied upon settled

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[21]See *Motor Vehicle Board v. Orrin W. Fox Co.*, 434 U.S. 1345 (1977) (*Core area* of liberty ... to engage in a gainful occupation that *arbitrarily* may not be denied by the State), *Examining Board v. Flores de Otero*, 426 U.S. 572 (1976) ("[R]ight to work ... in the common occupations ... purpose of the [Fourteenth] Amendment to secure....

principles in defense to wilful self-help, then, sham defense. Now, under the Lebedeff Ruling, any partner in a partnership, particularly one with a "national" *name*, "at will" may avoid all satisfaction of §§'s 80-81 filing and publication, avoid all §63 due process limitations, avoid the absence of §62(d) expulsion power "strictly applied", rather, simply imagine a dissolution and thereby "acquire" all of the now former partner's interests, i.e., *de facto* exclude that partner notwithstanding consequential destruction of livelihood and reputation - indeed, "nationally" - "at will". The simple statement of the absurdity of acceptance of this contrivance demonstrates its unreality, more, explains the consistent failure in all public record even of the defense's contention.

C. Recusal; Other Relief

Liteky v. United States, __ U.S. __, 62 U.S.L.W. 4161, *supra*, supports recusal:

> [O]pinions formed by the judge on the basis of *facts introduced or events occurring* in the course of the current proceedings, or prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a *deep-seated favoritism or antagonism that would make fair judgment impossible*... They **may** do so if they reveal an opinion that derives from an extrajudicial source; and they **will** do so if they reveal such a *high degree of favoritism or antagonism* as to make fair judgment impossible... *Id.* at 4166. (Emphasis added).

The court's adoption of inappropriate characterization of a prior district court judge concerning AEC's attorney/client and marital relationship - indisputably, not "facts introduced" nor "events occurring" - is from both an extrajudicial source and reflects a "high degree of favoritism".[22] Regrettably, the proceedings exhibited objectionable court conduct analogous to that

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[22]*See generally*, *Nicodemus v. Chrysler Corp.*, 596 F.2d 152, 155-157, and n10 (6th Cir. 1979) (court's vilification of appellant), *Haines v. Liggett Group Inc.*, 975 F.2d 81, at 98 (3rd Cir. 1992) citing *Nicodemus*, and *Roberts v. Bailar*, 625 F.2d 125 (6th Cir. 1980) ("...ardent sentiments about [a party's] character... impartiality vanished...").

characterized in *Hamm v. Members of the Bd. of Regents of State of Fla.*, 708 F.2d 647, at 651 (11th Cir. 1983) ("partisan zeal") and *Knapp v. Kinsey*, 232 F.2d 458, 467 (6th Cir. 1956) (court "assume[d]... role of advocate"). Notably, in *Mehta*, 905 F.2d *supra*, in addition to identifying Federally protected "property rights", the Circuit Court at 596 n.2 recognized and placed reliance upon a procedural rule of fundamental fairness - the R. 12(b)(6) to R. 56 "conversion" rule:

> "Although the defendants moved ... under Fed R. Civ P. 12(b)(6), they presented and relied on exhibits and affidavits outside the complaint. We therefore treat their motion as one for summary judgment."[23]

CONCLUSION

Inter alia, grounded upon "conversion" in the First Federal Action, AEC requests vacatur of the Second Summary Order and remand of all claims. In consequence of the unfair denial to AEC of relief in the First Federal Action, prejudicially, AEC has been denied a fair State court forum. The circumvention of LLL&M's "at will" contrivance continues; nonetheless, judicial characterizations unfairly addressing LLL&M's purported "at will" defense have denied all Constitutional outcome. The Due Process and Equal Protection guarantees assured to AEC under Partnership Law §§62(1)(d), 63 and 80-81 have been subverted, indeed, upon uniquely unfair State court "proceedings".

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[23]*Accord, Fonte v. Board of Managers of Continental Towers Condominium*, 848 F.2d 24 (2nd Cir. 1988); and *Jordan*, 20 F.3rd, supra, at 1261 ("[u]nder Rule 12(b)(6), a court looks only to the facts alleged in the complaint ... without reference to other parts of the record).

For all of these reasons, the Petition for a Writ of Certiorari should be granted.

Dated: New York, New York
August 30, 1995

Respectfully submitted,

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APPENDICES

APPENDIX A – OPINION OF UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK DATED AUGUST 19, 1994

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALISON E. CLAPP
Plaintiff,

-against-

LeBOEUF, LAMB, LEIBY & MacRAE, DONALD J. GREENE, DONALD J. GREENE, P.C., TAYLOR R. BRIGGS, TAYLOR R. BRIGGS, P.C., ALAN M. BERMAN, GEOFFRY D.C. BEST, DAVID P. BICKS, DAVID P. BICKS, P.C., CHARLES W. HAVENS, III, CHARLES W. HAVENS, III, P.C., DOUGLAS W. HAWES, DOUGLAS W. HAWES, P.C., CARL D. HOBELMAN, CARL D. HOBELMAN, CHARTERED, RONALD D. JONES, RONALD D. JONES, P.C., GRANT S. LEWIS, GRANT S. LEWIS, P.C., CAMERON F. MacRAE, III, CAMERON F. MacRAE, III, P.C., SAMUEL M. SUGDEN, SAMUEL M. SUGDEN, P.C., Collectively THE LeBOEUF, LAMB, LEIBY & MacRAE "ADMINISTRATIVE COMMITTEE", LeBOEUF, LAMB, LEIBY, & MacRAE, IRVING MOSKOVITZ, PETER N. SCHILLER, JOHN A. YOUNG, JOHN C. RICHARDSON, JOHN C. RICHARDSON, P.C., HON. DIANE A. LEBEDEFF, Individually and in her past or present capacity as Justice of the Supreme Court of the State of New York, New York County, and HON. JOSEPH P. SULLIVAN, HON. RICHARD W. WALLACH,

HON. THEODORE R. KUPFERMAN, HON. DAVID ROSS, HON. BETTY WEINBERG ELLERIN, HON. FRANCIS T. MURPHY, HON. JOHN CARRO, HON. BENTLY KASSAL, HON. GEORGE BUNDY SMITH, HON. ERNST H. ROSENBERGER, Each individually and in his/her past or present official capacities as Justices of the Appellate Division of the Supreme Court of the State of New York, First Department, (collectively THE "APPELLATE DIVISION," FIRST DEPARTMENT),

Defendants.

93 Civ. 8084 (SS)

SONIA SOTOMAYOR, U.S.D.J.

ORDER AND OPINION

Plaintiff Alison Clapp, a former partner of defendant law firm LeBoeuf, Lamb, Leiby & MacRae ("LeBoeuf"), filed the instant action against LeBoeuf, individual firm members and professional corporations (collectively, the "LeBoeuf defendants"), and the Honorable Justice Diane A. Lebedeff of the Supreme Court of the County of New York and the judges of the Appellate Division, First Department of the State of New York (collectively, "the State defendants"). The genesis of this federal action is Clapp's exclusion from membership in LeBoeuf after its 1989 dissolution and subsequent reconstitution in 1990.

All of the defendants have moved to dismiss the complaint, pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction and pursuant to 12(b)(6) for failure to state a claim. The LeBoeuf defendants have also moved, pursuant to Fed. R. Civ. P. 65, to enjoin plaintiff from instituting further actions against the defendants without prior court approval, and for sanctions against plaintiff pursuant to Fed. R. Civ. P. 11. Plaintiff has likewise moved for sanctions against the defendants under Rule 11. For the reasons discussed below, defendants' motions to

dismiss are granted, the LeBoeuf defendants' motion to enjoin litigation without prior approval is denied, and the LeBoeuf defendants' and plaintiff's motions for sanctions are denied.

I. *Background*

A. *Alison Clapp's Expulsion From LeBoeuf*

Alison Clapp joined LeBoeuf as an associate attorney in its tax department in 1981 and became a partner in 1986. In 1986, 1987 and 1988, plaintiff signed partnership agreements with the firm, which provided that the partnership term "shall be indefinite." Clapp's tenure at the firm deteriorated, however, apparently due to disagreements over her billable hours and productivity. In September 1989, when Clapp learned of her impending termination from the firm, she objected. LeBoeuf, nevertheless, ended the partnership relationship with plaintiff on December 31, 1989, when the firm of LeBoeuf, Lamb, Leiby & MacRae dissolved, and subsequently reformed on January 1, 1990, without plaintiff. Defendants also paid plaintiff those sums defendants believed were due to plaintiff under the partnership agreement. Clapp thereafter began her litigation crusade against LeBoeuf and its members through the federal and state courts.[1]

B. *The March 1990 Federal Action*

In March 1990, Clapp filed a federal action against LeBoeuf and several of its individual partners, alleging that the defendants had violated the Employee Retirement Income and Security Act of 1974, 29 U.S.C. §§ 1132(a)(1)(B), (a)(3) and 1140, as amended, and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*, as amended. The complaint also asserted various breach of contract and tort claims. By Order dated August 29, 1990, as amended by Order dated

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[1]A detailed discussion of plaintiff's termination is set forth in *Clapp v. Greene*, 743 F. Supp. 273 (S.D.N.Y. 1990), wherein the court dismissed Clapp's ERISA and RICO action against the various defendants, including LeBoeuf and several of the firm's partners also named in the instant action.

October 16, 1990, Judge Robert P. Patterson, Jr. granted the defendants motion to dismiss. *See Clapp v. Greene*, 743 F. Supp. 273 (S.D.N.Y. 1990). On October 26, 1990, Judge Patterson also denied plaintiff's motions to vacate his August 29th Order and for recusal and injunctive relief. The Second Circuit affirmed Judge Patterson's Orders on March 29, 1991. *Clapp v. Greene*, 930 F.2d 912 (2d Cir. 1991).

C. *The State Court Lawsuits*

In two separate state court actions filed in New York Supreme Court, New York County, Clapp again sued LeBoeuf, challenging her expulsion from the firm on the ground that the firm's 1989 dissolution and subsequent reformulation violated New York's partnership laws. Plaintiff's first action sought specific performance of the LeBoeuf partnership agreement, an accounting of partnership profits and declaratory and injunctive relief. In her second state court action, Clapp alleged claims of breach of contract, fraud, promissory estoppel and intentional infliction of emotional distress. By Order dated February 14, 1992, defendant Justice Lebedeff granted summary judgment for the defendants and dismissed both lawsuits.

Plaintiff appealed Justice Lebedeff's decision to the Appellate Division, First Department, which unanimously affirmed the lower court decision on December 15, 1992. Shortly thereafter, on or about April 8, 1993, the First Department denied plaintiff's request for leave to appeal to the Court of Appeals; plaintiff, nonetheless, filed a Notice of Appeal as of right to the Court of Appeals. The Court of Appeals dismissed the appeal in May 1993, finding that "no substantial constitutional question is directly involved."

D. *The Instant Federal Action*

On November 23, 1993, soon after the dismissal of her state court lawsuits, Clapp filed the instant action against the LeBoeuf defendants, Justice Lebedeff and the judges of the Appellate Division, First Department. Clapp's complaint and subsequent submissions to this Court can only be described as turgid. After much effort in deciphering Clapp's voluminous

submissions and her arguments before this Court, I discern the following five categories of claims, all of which are essentially premised on Clapp's contention that the defendants have misconstrued or misapplied New York's partnership laws, with the result of depriving her of her interest in continuing in the LeBoeuf partnership without due process of law.

First, Clapp appears to being challenging the state courts' legal interpretation of New York's partnership laws. She argues that the state courts' interpretation of those laws divested the statutes of their due process notice aspects, and, according to Clapp, made the laws "nugatory". Second, Clapp asserts a claim against the partnership laws as applied to her, arguing that the partnership laws deprived her of her property interest in the LeBoeuf partnership, without benefit of due process of law. Third, Clapp attempts to impose liability on LeBoeuf under 42 U.S.C. § 1983 for an unconstitutional taking of property, on the ground that LeBoeuf is a state actor as a result of its illegal utilization of the state's laws to divest her of her partnership interest. Fourth, Clapp alleges that the State defendants and LeBoeuf conspired to deprive her of her partnership interests in LeBoeuf without due process of law. Finally, Clapp also claims that the judicial procedure followed in her state court cases denied her a full opportunity to present her claims at the trial level and in the appellate courts. For all of these alleged violations of law, Clapp seeks damages as well as declaratory and injunctive relief. Complaint, ¶¶ 58-61.

On December 12, 1993, Clapp moved for a preliminary injunction enjoining LeBoeuf from terminating her interest in the firm. On numerous grounds, not the least that the LeBoeuf partnership in which plaintiff had been a member had dissolved four years earlier, I denied the preliminary injunction motion. Clapp challenged the legitimacy of my ruling by, in addition to appealing the denial of injunctive relief to the Second Circuit, moving for my recusal.[2] Plaintiff argued in support of recusal that I was wrong in denying her preliminary injunction motion and

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[2]Plaintiff's appeal from my denial of her request for a preliminary injunction is pending.

that I had demonstrated an improper demeanor towards plaintiff and her counsel during the preliminary in junction hearing held before me on December 20, 1993, and that my "suggestion of sanctions against counsel and the plaintiff, in context of the facts and circumstances of this case," required my recusal. Transcript of March 31, 1994 Hearing, p. 3 ("Tr."). I subsequently denied the motion to recuse, finding no grounds to justify my removal from this action.

In addition to opposing Clapp's preliminary injunction motion, the State defendants have cross-moved to dismiss the complaint, pursuant to Fed. R. Civ. P. 12(b)(1) and (b)(6), for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. The LeBoeuf defendants have also moved to dismiss on the same grounds, and further seek to enjoin plaintiff, pursuant to Fed. R. Civ. P. 65, from instituting any further lawsuits against the LeBoeuf defendants, without prior leave of the Court.

In response to defendants' motions, plaintiff has filed a steady stream of opposing documents and further motions. Clapp moved for sanctions against defendants, pursuant to Fed. R. Civ. P. 11, urging me to penalize defendants because they had submitted an unsigned cross-motion for dismissal and supporting memoranda. The motion was without merit and I denied her request for sanctions on March 21, 1994.

Thereafter, plaintiff filed a motion for reargument of her Rule 11 motion and she submitted supplemental papers on her motion to recuse. On April 29, 1994, I denied plaintiffs motion for reargument because she failed to present any legally cognizable basis for reconsideration of my decision.

Although all of plaintiff's initial motions were unsuccessful, she remained undaunted. She moved for Rule 11 sanctions a second time, on May 13, 1994. In this second motion, plaintiff claims that sanctions should be imposed on the defendants because they did not serve or file opposition papers to her motion to recuse, which Clapp argues was still pending because there was no denial of the recusal motion entered on this Court's docket. Plaintiff also requests that defendants' letter responses to her supplemental papers in support of her motion to recuse be stricken because they are prejudicial to her.

Consistent with plaintiff's practices, she has also recently

requested a conference regarding my denial of her motion to modify a transcript of a hearing before me because her counsel claims that the transcript does not accurately reflect what I said at the hearing. By Order dated August 12, 1994, I denied this request, advising plaintiff and her counsel that I did not say what counsel claims I said. A hearing or conference will not alter the fact that even if I had said what counsel claims, which I did not, I would have misspoken because I do not personally know Justice Lebedeff and have never had any personal or business contact with her that I can recall.

This summary rendition of plaintiff's motions illustrates the burdens of her motion practice on this Court and on the opposing parties.

E. *The March 31, 1994 Hearing*

The parties appeared before me at a hearing to argue the motions to dismiss on March 31, 1994 ("the Hearing"). At the Hearing, I explained to plaintiff's counsel that I had had difficulties in deciphering plaintiff's submissions. I posed several questions to plaintiff's counsel, in order to understand plaintiff's claims. Despite my efforts to clarify Clapp's arguments, plaintiff's counsel was unresponsive to my inquiries, often refusing to answer my questions and directing me to plaintiff's submissions as adequate to explain her position.

II. *The Motion to Dismiss Pursuant to Rule 12(b)*

The LeBoeuf and State defendants argue several grounds in support of their motions to dismiss. The grounds set forth in the defendants respective motions are similar and overlap. Briefly and collectively described, the defendants move for dismissal on the grounds that: 1) this court lacks subject matter jurisdiction; 2) the claims are time-barred; 3) *res judicata* and collateral estoppel bar any further litigation of the instant claims; 4) Clapp has not stated a claim under 42 U.S.C. § 1983; and 5) the State defendants are exempt under the doctrine of judicial immunity from liability for damages.

I reject the defendants' challenges based on lack of subject matter jurisdiction, the timeliness of the action, and *res judicata*

and collateral estoppel. However, defendants' other grounds for dismissal have merit and I find that under any of the theories advanced by Clapp, Clapp fails to state a viable federal claim.

A. *Subject Matter Jurisdiction*

Defendants claim that this Court lacks jurisdiction because, by the instant action, plaintiff actually seeks federal review of New York state court decisions, which review, defendants argue, is wholly outside the scope of this Court's jurisdictional authority. Although I agree that this Court does not have authority to review state court decisions based on state law, this Court does have subject matter jurisdiction over federal claims.

This Court's jurisdiction is circumscribed by the principle that a district court may not review final judgments of state courts. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415, 416, 44 S.Ct. 149, 150, 68 L.Ed. 362 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 1311, 1315 n.16, 103 S.Ct. 1303, 75 L.Ed.2d 207 (1983). Nevertheless, a federal court may properly consider a challenge to the constitutionality of a state rule or law, and in such a case, the court does have subject matter jurisdiction. *See Feldman*, 460 U.S. at 483, 103 S.Ct. at 1315-16.

Plaintiff is, in part, challenging the state courts' interpretation of the state's partnership laws and, thus, she is seeking direct review of the state courts' decisions. In accordance with the Supreme Court's rulings cited above, this Court does not have jurisdiction over that portion of plaintiff's claim. However, plaintiff's complaint can be interpreted to assert a federal challenge to the constitutional validity of the New York courts' interpretation of the partnership laws as they affect plaintiff's due process rights, to the parties' conspiratorial agreement to deprive her of her property without due process, and to the constitutional adequacy of the process afforded her in state court. Consequently, although this court is without jurisdiction to directly review the state courts' decisions, the court would have jurisdiction to consider plaintiff's constitutional challenges if her complaint were to set forth viable causes of action.

B. *Timeliness of Plaintiff's Action*

Defendants' further allegation that plaintiff's action is untimely because it was filed more than three years after the firm's dissolution and her expulsion from LeBoeuf is without merit. Defendants incorrectly characterize plaintiff's challenge as based solely on her expulsion from the firm. Plaintiff's instant action is, instead, premised on the alleged constitutional violations resulting from Justice Lebedeff's dismissal of plaintiff's state lawsuits and the subsequent affirmance of that decision by the Appellate Division and the New York State Court of Appeals. Since the New York Court of Appeals finally dismissed plaintiff's appeal in May 1993, all of the actions of which plaintiff complains occurred within three years of the filing of the instant lawsuit and this action, therefore, is timely.

C. *Res Judicata and Collateral Estoppel*

Defendants' contention that the plaintiff has previously litigated these same claims in state court is similarly unpersuasive. As already discussed, plaintiff's due process claims challenge actions by the State and LeBoeuf defendants concerning Clapp's state lawsuits, including how plaintiff's claims were treated by Justice Lebedeff, the Appellate Division and the New York State Court of Appeals. They are for the first time before this Court and, therefore, are not barred as having previously been resolved in some other judicial forum.

D. *Failure to State a Claim*

Defendants also argue that plaintiff's claims are without merit and may be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). Clapp does not set forth any viable federal claim, under even the most liberal reading of her submissions to this Court. As I discuss fully below, Clapp did not have a protected property or liberty interest in the continuation of the LeBoeuf partnership. Alternatively, assuming plaintiff had had an identifiable property or liberty interest in the LeBoeuf partnership, the defendants are not liable for any monetary damages to her because LeBoeuf is not a state actor subjecting it to liability under § 1983, Clapp has not sufficiently plead the existence of a conspiracy among the defendants, and because the State defendants are judicially immune

to suit for damages. Finally, Clapp has not suffered any deprivation of her procedural due process rights in the state courts. Therefore, the complaint does not survive the motions to dismiss.

Dismissal under Rule 12(b)(6) is warranted only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of [the plaintiff's] claim which would entitle [the plaintiff] to relief." *Ricciuti v. New York City Transit Auth.*, 941 F.2d 119, 123 (2d Cir. 1991), quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (footnote omitted). The issue "is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). In deciding a motion to dismiss under Rule 12(b)(6), the district court must assess the legal feasibility of the complaint. *Kopec v. Coughlin*, 922 F.2d 152,155 (2d Cir. 1991). In considering the motion, the allegations in the complaint must be construed favorably to the plaintiff. *Walker v. New York*, 974 F.2d 293, 298 (2d Cir. 1992), *cert. denied*, _ U.S. _ , 113 S.Ct. 1387, 122 L.Ed.2d 762 (1993). I find that defendants have satisfied their heavy burden on their Rule 12(b)(6) motion and I further find that plaintiff does not present any facts which would entitle her to the remedies she seeks.

1. *The Property and Liberty Interests at stake*

Clapp claims that she is entitled to injunctive and monetary relief because the state court decisions deprived her of her due process and liberty interests in the continuation of the LeBoeuf partnership until certain notice and hearing requirements were met before her interests were terminated. Not only does plaintiff misunderstand basic tenets of constitutional due process analysis, but plaintiff fails to comprehend the fundamental legal principles applicable to New York partnerships.

To succeed on her property right due process claim, Clapp "'must first identify a property right, second show that the state has deprived [her] of that right, and third show that the deprivation was effected without due process.'" *Local 342, Long Island Public Service Employees v. Town Board of the Town of Huntington*, No. 1186, 93-9073, slip op. at 5989 (2d Cir. July 28, 1994), quoting *Mehta v. Surles*, 905 F.2d 595, 598 (2d Cir. 1990) (per curiam). There is simply no legally recognizable argument

that Clapp has a protected property interest at stake herein. It is well-settled constitutional jurisprudence that property interests subject to due process protections are based on sources independent of the federal Constitution. Such interests

> are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

It is also well-settled that an individual has a property interest in a benefit if they are entitled to the benefit, and that in determining whether an individual has such entitlement, a court must consider "the applicable statute, contract or regulation which purports to establish the benefit." *Martz v. Incorporated Village of Valley Stream*, 22 F.3d 26, 30 (2d Cir. 1994), citing *Kelly Kare, Ltd. v. O'Rourke*, 930 F.2d 170, 175 (2d Cir.), *cert. denied*, _ U.S._, 112 S.Ct. 300, 116 L.Ed.2d 244 (1991).

Clapp's interest in the LeBoeuf partnership was strictly a creature of statutory and contractual sources. Clapp admits that her partnership agreement with LeBoeuf was for an indefinite term. New York's courts have unambiguously held that a partnership agreement of an indefinite term is an at will partnership which may be terminated by any partner at any time. *See, e.g., Shandell v. Katz*, 95 A.D.2d 742, 464 N.Y.S.2d 177 (lst Dept. 1983); *Malmeth v. Schneider*, 18 A.D.2d 1030, 238 N.Y.S.2d 986 (2d Dept. 1963). Accordingly, the formulation and existence of the partnership does not create, either under the contract or New York's laws, an entitlement or an interest in the indefinite or even limited continuation of the partnership. Therefore, the dissolution of LeBoeuf, with or without due process, cannot be a violation of constitutional rights because no right in the continuation of the partnership exists under New York law.

Clapp relies on sections 62, 63, 66-69, and 80-81 of New York's Partnership Law in support of her claims that she has a protected property interest in the partnership. These statutory provisions, however, are not a source for the proposed property

right. Instead, these sections merely set forth the manner by which a partnership may dissolve and the particular liabilities and responsibilities the partners bears upon dissolution.

Section 63 provides for dissolution by decree of the court, and sections 66-69 address the partners' liabilities and use of partnership property after dissolution. Section 80 describes when a partnership name may be continued and section 81 requires that a partnership certificate be filed with the county clerk. Section 62, in turn, specifically permits a partnership to dissolve at the request of any partner at any time:

> Dissolution is caused:
>
> 1. Without violation of the agreement between the partners,
>
> * * *
>
> (b) By the express will of any partner when no definite term or particular undertaking is specified....

N.Y. PARTNERSHIP LAW § 62 (McKinney 1988).
Nothing in these provisions can be construed to provide the basis for an entitlement to the continued existence of the partnership or the property rights which Clapp asserts herein.

This action, as well as Clapp's state law claims, involve an ordinary contract dispute between partners. Breach of contract actions, however, do not implicate due process rights or involve constitutionally protected property rights. *See Martz*, 22 F.3d at 31 ("where a breach of contract does not give rise to a deprivation of a protected property interest, plaintiffs exclusive remedy 'lies in state court for breach of contract.'" quoting *S & D Maintenance Co. v. Goldin*, 844 F.2d 962, 968 (2d Cir, 1988)). Accordingly, Clapp does not have a due process claim against the defendants because Clapp had no protected property interest which required due process before its termination or dissolution.

Clapp's liberty interest claim is similarly without merit. This Court is completely unable to comprehend how the dissolution of an at will partnership implicates federally protected liberty interests.

2. *State Action*

The LeBoeuf defendants argue that Clapp has not alleged the requisite state action required in a civil rights action. I agree with the LeBoeuf defendants' that, with respect to her due process and § 1983 claims against them, plaintiff has failed to properly plead the requisite state action.

Clapp characterizes the firm's dissolution and her expulsion from LeBoeuf as "state action" by LeBoeuf, because the State defendants placed the state' imprimatur on LeBoeuf's dissolution and Clapp's expulsion from the firm when they interpreted New York's partnership laws in a manner adverse to Clapp.

> THE COURT: How does that make them into a state actor, as opposed to someone who is breaching a contract or breaching the law or doing some other private wrong? How does that make them into a state actor doing, a wrong?
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> MR. O'CALLAGHAN: I am trying to remember Lugar v. Edmondson and these other cases. The Partnership Law is supposed to regulate their behavior. They have stood outside of the Partnership Law effectively and said, we don't need it, we don't have to abide by the principles of Partnership Law, we can deviate, we can reject it, we went public, we didn't have to make the dissolution. *And the Judiciary has effectively countenanced that. That's why they are a state actor. They've convinced the state they are regulated or purportedly regulated by the Judiciary, absent all certification and filing. The Judiciary had the responsibility to enforce that and didn't do it.* LeBoeuf hadn't presented any evidence that they did it. All the evidence is to the contrary.

Tr. 23-25 (emphasis added).

In order for the actions of private parties to constitute state action, "the conduct allegedly causing the deprivation of a federal right [must] be fairly attributable to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 2753, 73 L.Ed.2d 482 (1982). The Supreme Court has set forth a two part approach in determining whether such conduct is "fairly

attributable."

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the state is responsible . . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

Id., 102 S.Ct. at 2753-54.

The mere fact that plaintiff was unsuccessful in convincing the state courts of her interpretation of the partnership laws, however, does not convert LeBoeuf into a state actor or make LeBoeuf's actions improper state action. The Supreme Court has clearly held that mere action by a private party pursuant to a state statute, without more, is insufficient to convert the party into a state actor, and, thus, satisfy the state action requirement of § 1983. *See id.*, at 938-39, 102 S.Ct. at 2754.[3]

A district court must undergo a case-by-case, fact specific inquiry in order to determine whether the "something more" required for state action exists. *Id.* at 939, 102 S.Ct. at 2754-55. As I have already stated, Clapp has not alleged in her complaint that the LeBoeuf defendants did anything more than dissolve and reconstitute their firm. Clapp appears to argue that the State defendants' subsequent holding that the LeBoeuf defendants had not violated New York's partnership laws constitutes the

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[3]The Supreme Court has proposed various "tests" for determining when particular private conduct constitutes state action. These include: the "public function" test; the "state compulsion" test; the "nexus" test; and the "joint action" test. *See Lugar*, 457 U.S. at 939; 102 S.Ct. at 2754-55 (setting forth tests applicable to state actor inquiry). *See Lugar*, 457 U.S. at 939, 102 S.Ct. 2754-55 (identifying the various tests); *Rochez v. Mittleton*, 839 F.Supp. 1075, 1081 (S.D.N.Y. 1993) (finding no state action under the Supreme Court's two-part analysis, and further finding no state action under the nexus test). Clapp has not made out any set of facts which could, under any of these tests, arguably convert the activities of the LeBoeuf defendants into state action.

"something more" which elevates LeBoeuf's otherwise private conduct to that of state action, because the state permitted LeBoeuf to take her partnership interest without the due process notice required in the law. I do not agree.

Under Clapp's proposed interpretation of the state action test, any private entity or individual who complies with a state statute in dissolving or forming a business venture would be considered a state actor, subject to federal liability. Thus, for example, any person who seeks and improperly obtains a license from the state, such as a doing business license, would be a state actor. Such an interpretation of the federal statutes and federal caselaw is absurd and ignores the requirement that there be action in a private party's conduct beyond mere compliance with state law. This case does not present a situation of a private entity or individual acting as the state for purposes of § 1983. This is a private entity acting for its own interests, neither compelled by or in joint activity with the state. Accordingly, there is no viable § 1983 due process claim against the LeBoeuf defendants and Clapp's claims against the LeBoeuf defendants must be dismissed.

3. *The Conspiracy Claim*

As another basis for federal jurisdiction and as a separate claim against both the LeBoeuf and the State defendants, plaintiff has alleged that the parties conspired to deprive her of her partnership interest without due process of law. This allegation is unsupported in the complaint by any facts from which the existence of a conspiracy could be reasonably inferred.

The Second Circuit "has repeatedly held that complaints containing only 'conclusory,' 'vague,' or 'general allegations' of a conspiracy to deprive a person of constitutional rights will be dismissed." *Ostrer v. Aronwald*, 567 F.2d 551, 553 (2d Cir. 1977) (per curiam). "It is incumbent on a plaintiff to state more than conclusory allegations to avoid dismissal of a claim predicated on a conspiracy to deprive him of his constitutional rights." *Polur v. Raffe*, 912 F.2d 52, 56 (2d Cir. 1990) (citations omitted), *cert. denied*, 499 U.S. 937, 111 S.Ct. 1389, 113 L.Ed.2d 446 (1991). Here, plaintiff has pointed to no conduct or words denoting some agreement between the parties to deprive Clapp of her rights, and there is not a scintilla of evidence to support plaintiff's conclusory

statements about the existence of a conspiracy.

Indeed, as is made clear by counsels argument at the Hearing, plaintiff's conspiracy claim is based wholly on conjuncture [*sic*].

> THE COURT: Are you saying that the four Appellate Division judges conspired among themselves and with LeBoeuf individually or in combination thereof in some way to deprive you of your rights? If not, then are you saying that you simply misread the law?
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> MR. O'CALLAGHAN: It is not a simple misreading of the law. The Partnership Act has been applied uniformly throughout the states of the Union never in such a fashion as this. The Appellate Division was responsible, as was Judge [*sic*] Lebedeff, for enforcement of Sections 80 and 81, which is not a mere notice provision but a requirement of the law as to dissolution or a continuation of business in the same name. I *submit that that is a tacit agreement between the Judiciary and LeBoeuf not to enforce the law on their behalf, because there's no other reason they wouldn't have enforced it -- not even addressed it*. It's not included in Lebedeff's decision. It's not included in the Appellate Division's affirmance decision. LeBoeuf hasn't answered it at all. I think they have one sentence in the several hundreds of pages of briefing, which is to say that it is not really changed by LeBoeuf.

Tr. 19-20 (emphasis added).

Merely because Clapp lost in state court is not enough to reasonably conclude that a conspiracy between multiple members of the judiciary and the LeBoeuf defendants. Therefore, plaintiff's conspiracy claim must be dismissed.

4. *Judicial Immunity*

The State defendants invoke the protection afforded to them under the doctrine of judicial immunity against Clapp's claims that they violated her constitutional rights. The State

defendants maintain that judicial immunity shields a judge from monetary liability for conduct arising from actions done in the "exercise of his or her judicial function, even where these acts are in excess of jurisdiction or alleged to have been done maliciously or in bad faith." State Defendants' Memorandum of Law in Opposition to Plaintiff's Application for a Preliminary Injunction and in Support of Defendants' Motion to Dismiss, p. 12,

Judges' immunity from suits for money damages is well-recognized. *Mireles v. Waco*, 502 U.S. 9, 112 S.Ct. 286, 116 L.Ed.2d 29 (1991) (citations omitted). The Supreme Court has identified only two exceptions to the rule of absolute judicial immunity. First, a judge is not protected by immunity for "nonjudicial actions, i.e., actions not taken in the judge's judicial capacity." *Id.* (citing *Forrester v. White*, 484 U.S.219, 227-29, 108 S.Ct. 538, 544-45, 98 L.Ed.2d 555 (1988)). Second, a judge is not "immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction." *Id.* (citing *Forrester*, 484 U.S. at 356-57, 98 S.Ct. at 1104-05; *Bradley v. Fisher*, 13 Wall 335, 351, 20 L.Ed. 646 (1872)).

Plaintiff Clapp's entire claim against the State defendants is based on their treatment of her two state lawsuits, the procedure followed by Justice Lebedeff and the Appellate Division, and their ultimate decision on the merits. There is no legitimate basis in the complaint to conclude that the actions of which Clapp complains are anything but judicial in nature and, therefore, properly within the judicial functions of these defendants. Moreover, Clapp does not argue that the state courts and the State defendants were without jurisdiction to decide her claims. Consequently, Justice Lebedeff and the Appellate Division defendants are immune to suit by the plaintiff for monetary damages, and those claims seeking such damages must be dismissed.

5. *Procedural Due Process*

Clapp's further assertion that she was denied due process based on the state courts' refusal to provide her with a full and fair opportunity to present her claims is unsupported by the allegations in the complaint and are wholly without merit. Clapp admitted to this Court that she had a full opportunity to submit her factual and legal arguments to Justice Lebedeff and the appellate courts.

Clapp's basis for her charge of a violation of her due process rights against the State defendants is that Justice Lebedeff dismissed Clapp's lawsuits without allowing Clapp to complete discovery. However, the complaint does not allege that Clapp was denied the opportunity in the state courts to present her legal and factual claims in written submissions or to argue the motions before the courts. Therefore, the allegations in Clapp's complaint of due process violations by the State defendants are insufficient to state a claim.

III. *Enjoining Further Litigation*

The LeBoeuf defendants have requested that I enjoin plaintiff from filing any further actions against them, without prior permission from the Court. The LeBoeuf defendants argue that injunctive relief is warranted due to the "numerous baseless, and duplicative actions plaintiff has instituted in this State and in view of the fact that all of these claims pertain to the very same set of facts as the original federal law action in 1990 and in the subsequent state court proceedings,...." Reply Memorandum in Support of the LeBoeuf Defendants' Cross Motion, p. 19.

Plaintiff Clapp has certainly vigorously litigated her termination as a LeBoeuf partner. Moreover, she has certainly burdened this Court with needless and convoluted submissions. The right of free and open access to the courts, however, is fundamental and should not be restricted, unless extraordinary circumstances exist. Although plaintiff's prior federal and state actions were all premised on the propriety of LeBoeuf's dissolution and reformulation, I cannot say that those lawsuits were duplicative of this action, I am not prepared to, or justified in, enjoining any and all further litigations that have not first been approved by this Court when this action was only commenced after plaintiff exhausted her state remedies. Therefore, the instant motion to enjoin plaintiff from future litigation is denied. I certainly do not restrict defendants from renewing this motion in the future if plaintiff's conduct should warrant it. I also remind plaintiff's counsel, moreover, as I did at one of our earlier conferences, that his relationship as plaintiff's husband can quite easily cloud his judgment as a lawyer and that he and plaintiff may be better served in conferring with an independent attorney before filing papers or

actions in court.

IV. *The Motions for Rule 11 Sanctions*

Both the LeBoeuf defendants and plaintiff have moved for sanctions, pursuant to Fed. R. Civ. P. 11. Rule 11, as recently amended, provides as follows:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances.
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Imposition of sanctions under recently amended Rule 11 is discretionary, not mandatory. *Knipe v. Skinner*, 19 F.3d 72, 78 (2d Cir. 1994). Moreover, application of Rule 11 sanctions is limited "to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." Fed. R. Civ. P. 11(c)(2). This Circuit has warned that Rule 11 sanctions "should be imposed with caution." *Knipe*, 19 F.3d at 78.

Consequently, Rule 11 sanctions should not be imposed indiscriminately.

Defendants argue that sanctions here should be imposed on Clapp and her attorney because her motion to recuse was wholly unsupported and was "clearly interposed for an improper purpose, namely, to avoid a decision by a judge who has already denied her preliminary injunctive relief." LeBoeuf Defendants' Letter Dated February 18, 1994, p. 5. I cannot agree with defendants that the motion to recuse was filed strictly to avoid an adverse decision from me. I had already ruled adversely on plaintiff's motion for preliminary relief. In addition, Clapp's motion predated the Supreme Court's decision in *Liteky v. United States*, __ U.S. __, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994), upon which I based my decision denying the motion to recuse. I cannot penalize plaintiff for filing a motion without benefit of the Supreme Court's *Liteky* decision as guidance on the appropriate standards for recusal.

Clapp's Rule 11 cross-motion is also denied. Clapp is simply wrong on the facts and even if she were not, the conduct she complains of does not warrant sanctions.

Conclusion

For the reasons discussed above, the motions to dismiss, pursuant to Fed. R. Civ. P. 12(b), of all defendants are **GRANTED**. The LeBoeuf defendants' motion to enjoin plaintiff from filing further actions on this matter, without the prior permission of this Court, is **DENIED**. The LeBoeuf defendants' and plaintiff Alison Clapp's motions for sanctions are also **DENIED**. The Clerk of the Court is directed to enter judgment in accordance with this order.

SO ORDERED.

Dated: New York, New York
August 19, 1994

S/ Sonia Sotomayor
SONIA SOTOMAYOR, U.S.D.J.

APPENDIX B – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED APRIL 11, 1995

SDNY
93-cv-8084
JMW SOTOMAYOR

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 11th day of April, one thousand, nine hundred and ninety-five.

Present:

Honorable Wilfred Feinberg,
Honorable John M. Walker, Jr.,
Honorable Jose A. Cabranes,
Circuit Judges.

UNITED STATES COURT OF APPEALS
FILED
APRIL 11 1995
GEORGE LANGE, III, CLERK
SECOND CIRCUIT

ALISON E. CLAPP,
Plaintiff-Appellant,

-*v*.-

LeBOEUF, LAMB, LEIBY & MacRAE, DONALD J. GREENE,, DONALD J. GREENE, P.C., TAYLOR R..BRIGGS, TAYLOR R. BRIGGS P.C., ALAN M..BERMAN, GEOFFRY D.C. BEST, DAVID P. BICKS,.DAVID P. BICKS, P.C., CHARLES W. HAVENS, III, CHARLES W. HAVENS, III, P.C., DOUGLAS

W. HAWES, DOUGLAS W. HAWES, P.C., CARL D. HOBELMAN, CARL D. HOBELMAN, CHARTERED RONALD D. JONES, RONALD D. JONES, P.C., GRANT S. LEWIS, GRANT S. LEWIS, P.C., CAMERON F. MacRAE III, CAMERON F. MacRAE, III, P.C., SAMUEL M. SUGDEN, SAMUEL M. SUGDEN, P.C., collectively, THE LeBOEUF, LAMB, LEIBY & MacRAE "ADMINISTRATIVE COMMITTEE", LeBOEUF, LAMB, LEIBY, & MacRAE, IRVING MOSKOVITZ, PETER N. SCHILLER, JOHN A. YOUNG, JOHN C. RICHARDSON, JOHN C. RICHARDSON, P.C., HON. DIANE A. LEBEDEFF, INDIVIDUALLY AND IN HER PAST OR PRESENT OFFICIAL CAPACITY AS JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY, HON. JOSEPH P. SULLIVAN, HON. RICHARD W. WALLACH, HON. THEODORE R. KUPFERMAN, HON. DAVID ROSS, HON. BETTY WEINBERG ELLERIN, HON. FRANCIS T. MURPHY, HON. JOHN CARRO, HON. BENTLY KASSAL, HON. GEORGE BUNDY SMITH AND HON. ERNST H. ROSENBERGER, EACH INDIVIDUALLY AND IN HIS/HER PAST OR PRESENT OFFICIAL CAPACITIES AS JUSTICES OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST DEPARTMENT, (collectively, THE "APPELLATE DIVISION", FIRST DEPARTMENT),

Defendants-Appellees.

ORDER

No. 94-9002

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York (Sonia Sotomayor, *Judge*), and was submitted after counsel for appellant in open court waived oral argument after he was notified that his Motion for Adjournment and Reassignment was denied.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is AFFIRMED.

Alison E. Clapp's appeal comes before us following protracted litigation in both state and federal court. Her numerous actions concern her exclusion from partnership in LeBoeuf, Lamb, Leiby & MacRae ("LLL&M") where she was a partner from 1986 until 1989, when the partnership dissolved and reconstituted on January 1, 1990, The newly formed partnership excluded Clapp and twenty-eight other attorneys.

Clapp's series of lawsuits began in federal court. After her federal claims were dismissed, *Clapp v. Greene*, 743 F. Supp. 273 (S.D.N.Y. 1990), *aff'd*, 930 F.2d 912 (2d Cir. 1991), Clapp filed two separate state court actions in New York Supreme Court, New York County, alleging that the firm's 1989 dissolution and reformation violated New York's partnership laws. The consolidated lawsuits were dismissed by summary judgment, *Clapp v. LeBoeuf, Lamb, Leiby & MacRae*, No. 15586/91 (N.Y. Sup. Ct. Mar. 18, 1992) (Diane A. Lebedeff, *Justice*), and affirmed on appeal, *Clapp v. LeBoeuf, Lamb, Leiby & MacRae*, No. 46946 (N.Y. App. Div. Dec. 15, 1992). The First Department denied Clapp's requests for leave to appeal to the Court of Appeals. Nevertheless, Clapp filed a Notice of Appeal as of right to the New York Court of Appeals, which was dismissed because "no substantial constitutional question [was] directly involved." *Clapp v. LeBoeuf, Lamb, Leiby & MacRae*, No, 493 SSD 23, (N.Y. May 6, 1993).

On November 23, 1993 Clapp commenced the action now on appeal against LLL&M, its partners, Justice Lebedeff, and the judges of the Appellate Division, First Department. She alleged that: 1) the state courts' interpretation of New York's partnership laws was erroneous, 2) the partnership laws were constitutionally invalid as applied to her, 3) LLL&M was liable under 42 U.S.C. § 1983 for constitutionally depriving her of her property by divesting her of her partnership interest, 4) LLL&M and the State defendants conspired to deprive her of that interest without due process of law, and 5) the judicial procedure in state court deprived her of a full opportunity to present her claims. As a result, Clapp sought declaratory and injunctive relief.

Defendants argued in the district court that under the doctrine established by *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 461 (1983), and *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), the district court did not have jurisdiction over appellant's claims. Nevertheless, the district court retained jurisdiction and granted defendants' motions to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). It held that Clapp had not demonstrated that the dissolution of the at-will partnership implicated a constitutionally protected liberty interest. The court added that even if such a property interest were at stake, LLL&M could not be construed as a state actor under the circumstances and the State defendants, who acted in their judicial capacities, were immune from suit by Clapp.

We assume, without deciding, that the district court did have jurisdiction. We have considered all of plaintiff-appellant's contentions advanced on this appeal, and we affirm substantially for the reasons given in Judge Sotomayor's comprehensive and well-reasoned opinion. *See Clapp v. LeBoeuf, Lamb, Leiby & MacRae*, No. 93 Civ. 8084 (SS) (S.D.N.Y. Aug. 19, 1994).

Hon. Jose A. Cabranes did not participate in the decision in this case. Pursuant to Local Rule § 0.14, the two remaining judges decided this appeal.

Hon. Wilfred Feinberg, U.S.C.J.

Hon. John M. Walker, Jr., U.S.C.J.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN THE UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

APPENDIX C – ORDER OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING EN BANC DATED JUNE 22, 1995

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURTHOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 22nd day of June one thousand nine hundred and ninety-five.

ALISON E. CLAPP,
Plaintiff-Appellant,

-v.-

LeBOEUF, LAMB, LEIBY & MacRAE, et al.,
Defendants-Appellees.

Dkt. No. 94-9002

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant, Alison E. Clapp,

Upon consideration by the panel that decided the appeal, it is
Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active

service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: s/ Carolyn Clark Campbell
Carolyn Clark Campbell
Chief Deputy Clerk

/seal
UNITES STATES COURT OF APPEALS
FILED
JUNE 22, 1995
GEORGE LANGE, III, CLERK
SECOND CIRCUIT

APPENDIX D - JUDGMENT OF UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK DATED AUGUST 30, 1994

ALISON E. CLAPP,
Plaintiff,

-against-

LeBOEUF, LAMB, LEIBY & MacRAE, DONALD J. GREENE, DONALD J. GREENE, P.C., TAYLOR R. BRIGGS, TAYLOR R. BRIGGS, P.C., ALAN M. BERMAN, GEOFFRY D.C. BEST, DAVID P. BICKS, DAVID P. BICKS, P.C., CHARLES W. HAVENS, III, CHARLES W. HAVENS, III, P.C., DOUGLAS W.HAWES, DOUGLAS W. HAWES, P.C., CARL D. HOBELMAN, CARL D. HOBELMAN, CHARTERED, RONALD D. JONES, RONALD D. JONES, P.C., GRANT S. LEWIS, GRANT S. LEWIS, P.C., CAMERON F. MacRAE, III, CAMERON F. MacRAE, III, P.C., SAMUEL M. SUGDEN, SAMUEL M. SUDGEN [sic], P.C., Collectively, THE LeBOUEF, LAMB, LIEBY [sic] & MacRAE "ADMINISTRATIVE COMMITTEE", LeBOEUF, LAMB, LEIBY, & MacRAE, IRVING MOSKOVITZ, PETER N. SCHILLER, JOHN A. YOUNG, JOHN C. RICHARDSON, JOHN C. RICHARDSON, P.C., HON. DIANE A. LEBEDEFF, Individually and in her past or present capacity as Justice of the Supreme Court of the State of New York, New York County, and HON. JOSEPH P. SULLIVAN, HON. RICHARD W. WALLACH, HON. THEODORE R. KUPPERMAN, HON. DAVID ROSS, HON. BETTY WEINBERG ELLERIN, HON. FRANCIS T. MURPHY, HON. BENTLY KASAL, HON. GEORGE BUNDY SMITH, HON. ERNST H. ROSENBERGER, Each individually and in his/her past or present official capacities as Justices of the Appellate Division of the Supreme Court of the State of New York, First Department, (collectively THE "APPELLATE DIVISION," FIRST DEPARTMENT,
Defendants.

All defendants having moved to dismiss the complaint,

pursuant to F.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction, and pursuant to 12(b)(6) for failure to state a claim, the LeBoeuf defendants having also moved pursuant to F.R.Civ.P. 65, to enjoin plaintiff from instituting further actions against the defendants without prior court approval, and for sanctions against plaintiff pursuant to F.R.Civ.P. 11, plaintiff having also moved for sanctions against the defendants under Rule 11, and the said motions having come before the Honorable SONIA SOTOMAYOR, U.S.D.J., and the Court hereafter on August 22, 1994, having rendered its order and opinion (#73591); denying the LeBoeuf defendants' motion to enjoin litigation without prior approval, and denying the LeBoeuf defendants' and plaintiff's motions for sanctions, and granting defendants' motion to dismiss, it is,

ORDERED, ADJUDGED AND DECREED: That the LeBoeuf defendants' motion to enjoin litigation without prior approval be and it is hereby denied, and it is further,

ORDERED, that the LeBoeuf defendants' and plaintiff's motions for sanctions be and they are hereby denied, and it is further,

ORDERED, that defendant's motions to dismiss be and they are hereby granted, and it is further,

ORDERED, that the complaint be and it is hereby dismissed for the reasons stated in the Court's Order and Opinion, dated August 22, 1994.

DATED: NEW YORK, NEW YORK
August 30, 1994

S/ James M. Parkison
Clerk
By: S/ Ronald A. Church
Deputy Clerk

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON 8/31/94

APPENDIX E -- MOTION FOR ADJOURNMENT AND REASSIGNMENT, AND ORDER DENYING MOTION, DATED APRIL 7, 1995 TOGETHER WITH AFFIRMATION IN SUPPORT, WITH PARTIAL EXHIBITS, DATED APRIL 7, 1995

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALISON E. CLAPP

- v. -

LeBOEUF, LAMB, LEIBY & MacRAE,
et al.

NOTICE OF MOTION FOR
ADJOURNMENT AND REASSIGNMENT

Docket Number 94-9002

* * *

Brief statement of the relief requested: It is in the interest of justice and impartiality that this appeal be adjourned and reassigned.

s/Daniel J. O'Callaghan
Appearing for Alison E. Clapp

April 7, 1995

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is denied.

s/J.M. Walker, Jr.
Circuit Judge
4.10.95

/seal
UNITES STATES COURT OF APPEALS
FILED
APRIL 10, 1995
GEORGE LANGE, III, CLERK
SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALISON E. CLAPP,
Plaintiff-Appellant,

-against-

LeBOEUF, LAMB, LEIBY & MacRAE, et al.
Defendant-Appellee.

C.A. No. 94-9002

AFFIRMATION IN SUPPORT OF
PLAINTIFF'-APPELLANT'S MOTION FOR
ADJOURNMENT AND REASSIGNMENT

I, Daniel J. O'Callaghan, attorney on behalf of Plaintiff-Appellant Alison E. Clapp ("**AEC**") do affirm under penalty of perjury:

1. I submit this affirmation in support of AEC's Motion for Adjournment and Reassignment (the "**Motion for Adjournment/Reassignment**"). Oral argument upon the pending appeal is scheduled for 10 a.m. on April 10, 1995.

2. In accordance with the Court's rules, on April 6, 1995, there was published a listing of the Panel assigned concerning this appeal. The listing indicates that the Hon. Jose A. Cabranes, U.S.C.J., and the Hon. John M. Walker, Jr., U.S.C.J., have been assigned to hear this appeal.

3. An issue upon this appeal centers upon the two (2) proceedings held before the District Court, Sonia S. Sotomayor, U.S.D.J., i.e., those proceedings held December 20, 1993, concerning AEC's Order to Show Cause application for a preliminary injunction, and proceedings held March 31, 1994, concerning Defendants'-Appellees' LeBoeuf, Lamb, Leiby & MacRae's (**LLL&M's**) and Hon. Diane A. Lebedeff's, et al.'s (the **Judicial Defendants**') motions to dismiss.

4. As outlined in the Record, at the oral argument held on March 31, 1994, Judge Sotomayor declined to question LLL&M or the Judicial Defendants concerning the substance of the motions to dismiss. Additionally, concerning Defendant-Appellee,

Diane A. Lebedeff, Acting Justice, Supreme Court of the State of New York, New York County, Judge Sotomayor stated : "I know her. I know her." The proceeding was transcribed by the Southern District Court Reporters at the request of Judge Sotomayor. Upon the June 14, 1994, filing of the transcript of this proceeding, a review of the transcript indicated that the above statement by Judge Sotomayor was not contained in the transcript.

5. In consequence, grounded upon 28 U.S.C. § 753 and FRAP R. 10, by motion dated on/about June 23, 1994, AEC requested that the transcript of the March 31, 1994, proceeding, in particular at page 17, lines 15-17, be corrected so as to include the statement of the existence of the above identified relationship as was stated by Judge Sotomayor at the March 31, 1994, proceeding. (Copy of transcript pages of the March 31, 1994, proceeding (A1413, 1416c) annexed as "**Ex A**"). Subsequently, by Order dated July 8, 1994, Judge Sotomayor denied AEC's motion, including the statement, "I made no reference to a 'relationship' between the Court and Justice Lebedeff...." (A1417-18). (Copy of Order dated July 8, 1994, annexed as "**Ex B**").

6. Thereafter, by letter dated July 29, 1994, AEC requested that Judge Sotomayor schedule a pre-motion conference relating to the events of the March 31, 1994, proceeding. AEC stated that the grounds for the pre-motion conference were to address AEC's presentation of a motion requesting that an evidentiary hearing be held concerning the March 31, 1994, proceeding and transcription thereof. Pursuant to Memo Endorsed order, dated August 12, 1994 (entered August 17, 1994), Judge Sotomayor denied AEC's request for such pre-motion conference, including the statement, "There is no basis for a hearing. I deny saying what you claim to remember. Even if I had mispoken, which I did not, ..." (A1419). (Copy of Memo-Endorsed order dated August 12, 1994, entered August 17, 1994, annexed as "**Ex C**"). Pursuant to Order and Opinion dated August 19, 1994, i.e., two (2) days later, Judge Sotomayor granted LLL&M's and the Judicial Defendants' motions to dismiss AEC's Complaint. This appeal has followed.

7. It may be recalled that at the December 20, 1993, proceeding upon AEC's application for a preliminary injunction, similarly, Judge Sotomayor declined to question LLL&M or the Judicial Defendants concerning the substance of their opposition to

AEC's preliminary injunction application. Also, in response to AEC's contention that Judge Lebedeff had responsibility concerning LLL&M's undisputed failure in compliance with New York Partnership Law §§ 80-81[4] requirement to file Certificate(s) of Dissolution" sworn to by all LLL&M members ... (purportedly, "since 1981 and earlier") and statutory obligation to publish evidence of said filings, Judge Sotomayor stated:

> "Private entities do not and are not required to follow due-process concerns ...
>
> " [W]hat difference does it make whether they published or didn't publish with respect to your client's claims ...
>
> "And I am going to entertain a motion for sanctions against you and your client ..." (A1170-1174).

---

[4]In pertinent part, New York Partnership Law, provides:

ARTICLE 7 - BUSINESS AND PARTNERSHIP NAMES

§80. When partnership or business name may be continued * * *

2. Where any partnership shall hereafter be formed ... it may use the firm ... name of any general ... partnership ... which may theretofore have carried on its business and where a majority of the partners ... shall be members of the new co-partnership ... shall consent in writing to the use of such firm ... name by such new co-partnership ...

§81. Certificate to be filed

Whenever a partnership ... name continues to be used as provided by ... [§80], the ... persons using such name shall *sign and acknowledge or swear to a certificate*, declaring the ... persons intending to deal under such name, with their ... residence[s], and *file* the same in the clerk's office ... *and* cause a copy of such certificate to be *published* once in each week for four consecutive weeks in a newspaper of the city .... A county clerk with whom any such certificate is filed shall keep a register in which shall be entered ... the name of every such partnership and ... partners thereof .... (Emphasis added).

At this December 20, 1993, proceeding, Judge Sotomayor did not make any reference whatsoever to any relationship between Judge Sotomayor and Defendant-Appellee Hon. Diane A. Lebedeff, which relationship subsequently at the March 31, 1994, proceeding Judge Sotomayor so stated to exist.

8. On April 1, 1995, *The New York Times* published a report concerning Judge Sotomayor's participation in another matter. The report characterizes Judge Jose A. Cabranes, a member of the Panel upon this appeal, as "a mentor and former professor of [Judge] Sotomayor's at Yale Law School". Respectfully, it is submitted that in consequence of the unique nature of this dispute, the events of the December 20, 1993, and March 31, 1994, proceedings, and said published report of such "mentor" relationship, it appears to be in the interests of justice and impartiality that the pending appeal be adjourned in order that the appeal be reassigned. (Copy of referenced *The New York Times*, April 1, 1995, report, annexed as "**Ex D**").

9. Additionally, there appear to be other grounds supporting said adjournment and reassignment. It may be recalled that at the calendar call for oral argument held on March 15, 1991, in the first appeal to this Court concerning this dispute grounded upon ERISA and RICO claims (the "**First Federal Action**"), Honorable Jon O. Newman, U.S.C.J., then presiding Judge, now Chief Judge, directed that the parties confer privately relating to any challenge to Judge Newman's participation in the hearing of the appeal grounded upon Judge Newman's announcement at the calendar call that LLL&M had been retained by Judge Newman and had drafted Judge Newman's will.

10. Thereafter, the oral argument which proceeded before a Panel including Judge Walker presented confirmation *by LLL&M* of summary judgment procedure implemented in the First Federal Action. Nonetheless, the (prior) Panel's affirmance was grounded upon a FRCP R. 12(b)(6) dismissal, i.e., affirmance notwithstanding mandatory conversion to summary judgment standard (FRCP R. 56) apparent upon the face of the First Federal Opinion -- a circumstance which had required reversal. Additionally, the (prior) Panel's affirmance was of a uniquely unfair and injurious "Trial by Affidavit", *Federal Supplement*-reported opinion upon "Beg the Question" characterization of LLL&M's sole contended -- nonetheless not evidenced -- "at will"

dissolution defense, a characterization thereafter unfairly which became outcome determinative in the subsequent State Court proceedings. These facts, circumstances and subsequent State Court proceedings provide the grounds upon which this appeal is presented.

11. Accordingly, it appears to be in the interests of justice and impartiality that this appeal be adjourned in order that the appeal be reassigned to a Panel which does not include judges who served upon the March 15, 1991, appeal to this Court concerning this dispute.

WHEREFORE, AEC requests that the pending appeal be adjourned and reassigned.

Dated: New York, New York
April 7, 1995

S/Daniel J. O'Callaghan
Attorney for Plaintiff-
Appellant
ALISON E. CLAPP
17 Battery Place, Suite 314
New York, New York 10004
(212) 222-4200

EXHIBIT A
TO AFFIRMATION IN SUPPORT,
OF MOTION FOR
ADJOURNMENT AND REASSIGNMENT
DATED APRIL 7, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALISON E. CLAPP,
Plaintiff,

-v.-

LeBOEUF, LAMB, LEIBY & MacRAE, et al.
Defendants.

93 Civ. 8084 (SS)

New York, N.Y.
March 31, 1994
3:45 p.m.

Before:

HON. SONIA SOTOMAYOR,
District Judge

APPEARANCES

DANIEL J. O'CALLAGHAN
Attorney for plaintiff

HERRICK FEINSTEIN
Attorneys for defendant
LeBoeuf, Lamb, Leiby & MacRae
and individual partners

BY: CAROL GOODMAN
CHRISTOPHER SULLIVAN

NEW YORK STATE DEPARTMENT OF LAW
Attorney for state defendants

BY: ABIGAIL PETERSEN

* * *

MR. O'CALLAGHAN: It was briefed, your Honor. I don't recall the precise terms, but it was briefed in the Appellate Division in June, opposed by LeBoeuf. They have every ability to grant her the discovery she requires pursuant to Sections 80 and 81 of the Partnership Law. They did nothing about it.

THE COURT: What did the Court of Appeals do?

MR. O'CALLAGHAN: The Court of Appeals dismissed the appeal of right on the grounds that no state constitutional question was directly involved, something to that effect.

THE COURT: Did you submit papers as to that?

MR. O'CALLAGHAN: Your honor, on the issue of an appeal of right, yes.

THE COURT: Are you claiming that the Supreme Court judge, Judge Lebedeff -- I am sorry, I am terrible with names -- are you claiming, and it appeared this way from your papers, that you are saying that she conspired with LeBoeuf in some way? Can you tell me what the nature of that conspiracy was?

MR. O'CALLAGHAN: I think it is elemental that the state law requires publication and filing of a certificate of dissolution by a legal partnership, it's the obligation of the state judicial officials to implement and enforce that. LeBoeuf represented they have dissolved "at....

EXHIBIT B
TO AFFIRMATION IN SUPPORT,
OF MOTION FOR
ADJOURNMENT AND REASSIGNMENT
DATED APRIL 7, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALISON E. CLAPP,
Plaintiff,

-*v.*-

LeBOEUF, LAMB, LEIBY & MacRAE, et al.
Defendants.

93 Civ. 8084 (SS)

SONIA SOTOMAYOR, U.S.D.J.

ORDER

Before the Court is plaintiff's motion, titled "Motion for Reargument or Reconsideration." Despite the characterization, plaintiff's motion is simply a request that I order a change in the transcript of a hearing held before me on March 31, 1994. Plaintiff claims that the transcript lacks a reference made by me to "a relationship between the Court and Defendant, Hon. Diane A. Lebedeff," Memorandum in Support of Motion for Reargument or Reconsideration, p.2, and that her prior motion for recusal can only be given proper consideration on a full and accurate transcript of the hearing. Plaintiff invokes 28 U.S. C. § 753(b), which refers to the recording of sessions before the court, and Fed. R. App. P. 10(e), which concerns corrections or modifications of the record on appeal, to support her motion.

Without addressing the propriety of plaintiff's invocation of a motion for reconsideration or reargument as a vehicle for her request, I grant the motion to reargue and for reconsideration. There being no error in the transcription of the March 31, 1994

hearing, however, Clapp's request for correction of the transcript is denied. Plaintiff has no basis for her request. I made no reference to a "relationship" between the Court and Justice Lebedeff, because there has never been a relationship of any kind. I have no association with or familiarity with Justice Lebedeff which would provide a ground for recusal. Therefore, there are no grounds to alter my prior decision denying plaintiff's request that I recuse myself.

SO ORDERED.

Dated: New York, New York
July 8, 1994

s/Sonia Sotomayor
SONIA SOTOMAYOR
U.S.D.J.

EXHIBIT C
TO AFFIRMATION IN SUPPORT,
OF MOTION FOR
ADJOURNMENT AND REASSIGNMENT
DATED APRIL 7, 1995

DANIEL J. O'CALLAGHAN
ATTORNEY AT LAW
17 BATTERY PLACE
NEW YORK, N.Y. 10004
212-222-4200

TELECOPIER: 212-222-4205

The Honorable Sonia Sotomayor
United States District Judge
United States District Court
Southern District of New York
40 Centre Street
New York, New York 10007

Re: Alison E. Clapp v. LeBoeuf Lamb Leiby & MacRae, et al.
93 Civ. 8084 (SS)

Dear Judge Sotomayor,

Plaintiff, Alison E. Clapp, writes to the Court to request a pre-motion conference relating to the events of the March 31, 1994 hearing before the Court.

The legal and factual basis for the proposed motion is grounded upon the Court's order dated July 8, 1994 relating to the events recorded at the March 31, 1994 hearing. **Inter alia**, Plaintiff relies upon 28 U.S.C. § 753(b), which refers to the recording of sessions before the Court, and Fed. R. App. P. 10(e), which concerns corrections or modifications of the record on appeal.

It appears appropriate that in consequence of the referenced order, an evidentiary hearing concerning the events of the March

31, 1994 hearing and the transcription thereof be held and/or that the recollection of counsel in this action and that of the approximately 10-15 other persons in attendance during the hearing - particularly counsel upon other matters - be examined.

Respectfully,

Daniel J. O'Callaghan

DJOC: wr
cc: Christopher J. Sullivan, Esq. (by mail)
Abigail I. Petersen, Esq. (by mail)

MEMO ENDORSED

[Handwritten:]
Request denied. There is no basis for a hearing. I deny saying what you claim to remember. Even if I had misspoken, which I did not, I ~~there is~~ have no relationship with Justice Lebedeff whatsoever. If have ever even met her, and I don't remember doing so, it was or would have been in passing.

s/Sonia Sotomayor
USDJ 8/12/94
[End of handwritten material]

SEAL
U.S.DISTRICT COURT
FILED
AUG 17 1994
S.D. OF N.Y.

COPIES MAILED BY JUDGE SOTOMAYOR'S CHAMBERS
ON [Handwritten:] 8/16/94

EXCERPTS FROM
EXHIBIT D
TO AFFIRMATION IN SUPPORT,
OF MOTION FOR
ADJOURNMENT AND REASSIGNMENT
DATED APRIL 7, 1995

THE NEW YORK TIMES, SATURDAY, APRIL 1, 1995

Strike-Zone Arbitrator

Sonia Sotomayor

By JAMES C. McKINLEY, Jr.

Woman in the News

In her two and a half years on the bench, United States District Court Judge Sonia Sotomayor has earned a reputation as a sharp, outspoken and fearless jurist, someone who does not let powerful interests bully, rush or cow her into a decision.

She lived up to that billing yesterday morning, when the fate of major league baseball was thrust upon her. After a two-hour hearing in which she grilled both sides on the fine points of labor law, she took only 15 minutes to issue an injunction that could break the deadlock in the baseball strike.

* * *

"She's tough and tenacious as well as smart," said Justice Jose A. Cabranes of the United States Court of Appeals for the Second Circuit, a mentor and former professor of Sotomayor's at Yale Law School. "She is not intimidated or overwhelmed by the eminence or power or prestige of any party, or indeed of the media."

* * * *

APPENDIX F - MOTION FOR RELIEF RELATING TO EN BANC REHEARING DATED APRIL 17, 1995 WITH ORDER DENYING MOTION, DATED MAY 12, 1995 TOGETHER WITH AFFIRMATION IN SUPPORT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALISON E. CLAPP

v.

LeBOEUF, LAMB, LEIBY & MacRAE

NOTICE OF MOTION
Relief Relating to En Banc Rehearing

Docket Number 94-9002

/seal
United States Court of Appeals
Filed
April 17, 1995
George Lange III, Clerk
Second Circuit

* * *

Brief statement of the relief requested: It is in the interests of justice that there be an adjournment of requirement for submission of a Petition en banc for Rehearing until a reasonable time subsequent to decision by the U.S. Supreme Court upon Appellant's request for remedy, together with adjournment of en banc submission

s/Daniel J. O'Callaghan -- appearing for Alison E. Clapp
April 17, 1995

IT IS HEREBY ORDERED that the motion be and it hereby is denied

s/J.M. Walker
Circuit Judge
5/12/95

/seal
United States Court of Appeals
Filed
May 12, 1995
George Lange III, Clerk
Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALISON E. CLAPP
Plaintiff-Appellant

- against -

LeBOEUF, LAMB, LEIBY & MacRAE; et al.
Defendant-Appellee.

C.A. No. 94-9002

AFFIRMATION IN SUPPORT OF PLAINTIFF'-APPELLANT'S MOTION RELATING TO EN BANC REHEARING

I, Daniel J. O'Callaghan, attorney on behalf of Plaintiff-Appellant Alison E. Clapp ("**AEC**") do affirm under penalty of perjury:

1. I submit this affirmation in support of AEC's Motion Relating to En Banc Rehearing ("**Motion Relating to En Banc Rehearing**"). At the oral argument of this appeal at 10 a.m. on April 10, 1995, Affirmant advised this Court that in consequence of the April 7, 1995, denial of AEC's Motion for Adjournment and Reassignment ("**Motion for Reassignment**") grounded upon the facts and circumstances therein stated, respectfully, AEC relied upon rights arising upon the denial of the Motion for Reassignment. AEC did not consent to submission of the appeal to the Panel.

2. In context of the record in these proceedings as developed since this dispute was first presented to a U.S. District Court in March, 1990, thereafter to this Circuit, thereafter to the State of New York Courts, thereafter to another U.S. District Court and again to this Circuit -- notably, absent any relief to AEC notwithstanding patent, sham LLL&M defense, and clearly erroneous denial of Constitutional due process and equal protection rights -- so as to preserve to AEC a fair en banc rehearing, it is just and appropriate that the following relief be granted prior to the

time for filing of any en banc petition for rehearing (the "**Petition**"):

(i) adjournment of requirement for submission of a Petition to and until a reasonable time subsequent to decision by the United States Supreme Court upon AEC's submission of request for remedy in consequence of the denial of the Motion for Reassignment;

(ii) additionally, the grant of permission to serve and file a Petition of no more than thirty (30) pages in length;

(iii) the grant of permission to serve and file as exhibits to the Petition copies of:

(a) the transcript of court proceedings held December 20, 1993;

(b) the transcript of court proceedings held March 31, 1994;

(c) the Order dated July 8, 1994, relating to the court's denial of stated relationship to defendant-appellee Hon. Diane A. Lebedeff;

(d) the memo-endorsed Order filed August 17, 1994, denying AEC's request for an evidentiary hearing concerning the events of the March 31, 1994, proceeding and the transcription thereof, viz., the court's omission of inquiry of the Appellees upon any substantive issue upon their motions to dismiss, together with the court's identification of a relationship with Hon. Diane A. Lebedeff; and

(e) the Order and opinion of the district court

dated August 19, 1994.

WHEREFORE, AEC requests that the above relief be granted.

Dated: New York, New York
April 17, 1995

S/Daniel J. O'Callaghan
Attorney for Plaintiff-Appellant
ALISON E. CLAPP
17 Battery Place, Suite 314
New York, New York 10004
(212) 222-4200

APPENDIX G - UNITED STATES CONSTITUTION FOURTEENTH AMENDMENT, IN PERTINENT PART

Section 1. .... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. ....

APPENDIX H - NEW YORK STATE PARTNERSHIP LAW EXCERPTS

ARTICLE 6 - DISSOLUTION AND WINDING UP

* * *

§61. Partnership not terminated by dissolution

On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.

§62. Causes of dissolution

Dissolution is caused:

1. Without violation of the agreement between the partners,

(a) By the termination of the definite term or particular undertaking specified in the agreement,

(b) By the express will of any partner when no definite term or particular undertaking is specified,

(c) By the express will of all the partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specified term or particular undertaking,

(d) By the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners;

2. In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time;

3. By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership;

4. By the death of any partner;

5. By the bankruptcy of any partner or the partnership;

6. By decree of court under section sixty-three.

§63. Dissolution by decree of court

The court shall decree a dissolution.

1. On application by or for a partner whenever:

(a) A partner has been declared incompetent in any judicial proceeding or is shown to be of unsound mind,

(b) A partner becomes in any other way incapable of performing his part of the partnership contract,

(c) A partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business,

(d) A partner wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him,

(e) The business of the partnership can only be carried on

at a loss,

(f) Other circumstances render a dissolution equitable;

2. On the application of the purchaser of a partner's interest under sections fifty-three or fifty-four:

(a) After the termination of the specified term or particular undertaking,

(b) At any time if the partnership was a partnership at will when the interest was assigned or when the charging order was issued.

* * *

§ 68. Right to wind up

Unless otherwise agreed the partners who have not wrongfully
dissolved the partnership or the legal representative of the last surviving partner, not bankrupt, has the right to wind up the partnership affairs; provided, however, that any partner, his legal representative, or his assignee, upon cause shown, may obtain winding up by the court.

§69. Rights of partners to application of partnership property

1. When dissolution is caused in any way, except in contravention of the partnership agreement, each partner, as against his copartners and all persons claiming through them in respect of their interest in the partnership, unless otherwise agreed, may have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners. But if dissolution is caused by expulsion of a partner, bona fide under the partnership agreement, and if the expelled partner is discharged from all partnership liabilities, either by payment or agreement under section sixty-seven, subdivision two, he shall receive in cash only the net amount due him from the partnership.

2. When dissolution is caused in contravention of the partnership agreement the rights of the partners shall be as follows:

(a) Each partner who has not caused dissolution wrongfully shall have,

(I) All the rights specified in subdivision one of this section, and

(II) The right, as against each partner who has caused the dissolution wrongfully, to damages for breach of the agreement.

(b) The partners who have not caused the dissolution wrongfully, if they all desire to continue the business in the same name, either by themselves or jointly with others, may do so, during the agreed term for the partnership and for that purpose may possess the partnership property, provided they secure the payment by bond approved by the court, or pay to any partner who has caused the dissolution wrongfully, the value of his interest in the partnership at the dissolution, less any damages recoverable under clause (II) of paragraph (a) of subdivision two of this section, and in like manner indemnify him against all present or future partnership liabilities.

(c) A partner who has caused the dissolution wrongfully shall have:

(I) If the business is not continued under the provisions of paragraph (b) of subdivision two of this section all the rights of a partner under subdivision (1), subject to clause (II) of paragraph (a) of subdivision two, of this section.

(II) If the business is continued under paragraph (b) of subdivision two of this section the right as against his copartners and all claiming through them in respect of their interest in the partnership, to have the value of his interest in the partnership, less any damages caused to his copartners by the dissolution, ascertained and paid to him in cash, or the payment secured by bond approved by the court, and to be released from all existing liabilities of the partnership; but in ascertaining the value of the

partner's interest the value of the good-will of the business shall not be considered.

ARTICLE 7 - BUSINESS AND PARTNERSHIP NAMES

§80. When partnership or business name may be continued

The use of a partnership or a business name may be continued in either of the following cases:

1. Where the business of any firm or partnership in this state, having business relations with foreign countries or which has transacted business in this state or in any other state or territory of the United States continues to be conducted by some or any of the partners, their or any of their assignees, appointees or successors in interest.

2. Where any partnership shall hereafter be formed under the laws of this state it may use the firm or corporate name of any general or limited partnership or of any corporation, domestic or foreign, which may theretofore have carried on its business within this state, where said general or limited partnership or corporation has discontinued or shall be about to discontinue its business within the state, and where a majority of the partners, general or special, in either of such last mentioned copartnerships or of the survivors thereof shall be members of the new copartnership, or where a majority of the members of such copartnership theretofore existing or of the surviving members thereof, or where stockholders holding a majority of the stock of such corporation shall consent in writing to the use of such firm or corporate name by such new copartnership; or

3. Where any resident of this state dies, who at the time of his death and for at least five years immediately prior thereto, conducted and carried on in his sole name, any business in this state, or who at the time of his death, so conducted and carried on any business having relation with other states or foreign countries, the right to use the name of such person, for the purpose of continuing and carrying on such business, shall survive and pass and be disposed of and accounted for as a part of the personal

estate of such deceased person, and such business may be continued and carried on under such name by any person who comes into the legal possession thereof.

§81. Certificate to be filed

Whenever a partnership or business name continues to be used as provided by section eighty, the person or persons using such name shall sign and acknowledge or swear to a certificate, declaring the person or persons intending to deal under such name, with their respective places of residence, and file the same in the clerk's office of the county where the principal place of business is located, and cause a copy of such certificate to be published once in each week for four consecutive weeks in a newspaper of the city or town in which such principal place of business is located, or if none be published in such city or town, in the newspaper nearest thereto. A county clerk with whom any such certificate is filed, shall keep a register in which shall be entered in alphabetical order the name of every such partnership and of the partners thereof, and every such business name of a deceased person and the names of the person filing certificates therefor.

APPENDIX I - 28 U.S.C. §1343
EXCERPT

§1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

* * *

APPENDIX J - 42 U.S.C. §1983
EXCERPT

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

* * *